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Abstract

This article analyses the criteria and guidelines that have been developed for the operation of circle sentencing as a method of First Nation community participation in the Canadian criminal justice system. The objective of this analysis is to determine whether circle sentencing has the potential to transfer decision-making authority over sentencing from judges within the non-Aboriginal justice system to sentencing circle participants and First Nation communities. This article concludes that although it operates under certain judicially imposed constraints, and without a solid legislative foundation, circle sentencing does have the potential to shift the locus of decision-making authority in a manner which is consistent with the aspiration of many First Nation communities for greater autonomy in the administration of justice.

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THE LOCUS OF DECISION-MAKING AUTHORITY IN CIRCLE SENTENCING: THE SIGNIFICANCE OF CRITERIA AND GUIDELINES*

Luke McNamara**

1. INTRODUCTION

During the 1990s First Nation community participation in the form of “circle sentencing” has emerged as a significant feature of the Canadian criminal justice system. Circle sentencing involves the direct participation of community members in the sentencing of the offender in a manner which combines Aboriginal and non-Aboriginal processes and norms of justice. Circle sentencing had its origins in the combined efforts of judges concerned to improve the quality of justice which the mainstream justice system ‘delivered’ to Aboriginal communities and pressure from communities to be allowed more input into crucial decisions affecting them. Circle sentencing aims to reverse the colonial pattern of excluding Aboriginal people and values from important decision-making functions with respect to the administration of justice, and instead, invites Aboriginal communities to actively participate in decisions related to the sentencing of criminal offenders. The practice is currently employed in various parts of the country, and although it has been used in cases involving non-Aboriginal offenders, it remains primarily a process adopted in cases involving Aboriginal offenders.

This article examines the practice of circle sentencing against the background of the continuing demand by many Aboriginal communities for greater autonomy in relation to the administration of justice.¹ The aim will be to determine the extent to

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¹ This demand has been supported by a number of provincial and national inquiries. See, eg, Aboriginal Justice Inquiry of Manitoba (AJIM), *Volume 1: The Justice System and Aboriginal People* (Winnipeg: Province of Manitoba, 1991); Law Reform Commission of Canada (LRCC), *Aboriginal Peoples and Criminal Justice: Equality, Respect and the Search for Justice* (Ottawa: LRCC, 1991);

which the practice of circle sentencing can be considered to represent a shift away from the culturally inappropriate and unfair non-Aboriginal sentencing processes which have historically worked to the disadvantage of Aboriginal people, in favour of genuine respect for, and meaningful co-operation with, Aboriginal law and justice values and processes.² Prompted by a desire to unpack the apparent paradox of the common characterisation of circle sentencing—a practice ostensibly developed within judicially determined constraints—as an exercise in First Nation community-based justice, this article is primarily concerned with examining the implications of circle sentencing for the locus of decision-making authority in criminal cases involving Aboriginal offenders. Specifically, it is concerned with determining whether the practice of circle sentencing has the potential to shift the locus of decision-making authority from judges within the criminal justice system to participants in the sentencing circle, drawn primarily from the offender’s community. This issue will be addressed via an examination of the rules, criteria and guidelines which have been developed, primarily by judges, for the operation of circle sentencing.

The Canadian judiciary has exerted what might be considered a rather paradoxical influence on the shape of circle sentencing as a vehicle for Aboriginal community participation in the task of criminal justice administration. On the one hand, judges have played a pivotal ‘nurturing’ role in the initiation, fostering and development of the practice of circle sentencing. As Desjardins J of the New Brunswick Provincial Court observed in *R v Nicholas*³ observed:

and Royal Commission on Aboriginal Peoples (RCAP), *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* (Ottawa: RCAP, 1996).

² Circle sentencing is only one of a number of recent justice initiatives characterised by greater participation and responsibility for First Nation communities, including Elders’ panels, family group conferencing, and various other community mediation and diversion programs. A notable example of the latter is the Teslin Tlingit First Nation’s Peacemaker Court, which has been established based on the Teslin Tlingit clan system. In March 1995 Justice Canada and the Teslin Tlingit Council signed a “Protocol for the Creation of an Alternative Justice Services Delivery Model” which allows for the diversion of certain offences from the conventional criminal justice system to the Teslin Tlingit Peacemaker Court. This article does not make any assumption about the relative significance of circle sentencing when compared with these other community justice initiatives—no comparison is attempted. It is worth noting, however, that different forms of community justice may evolve out of experience with circle sentencing. Darren Winegarden, from the Federation of Saskatchewan Indian Nations has observed that one of the benefits of circle sentencing for First Nation communities is that it has opened upon possibilities for communities to identify and pursue other forms of participation in, and responsibility for, justice administration: author interview with Darren Winegarden, Director of Justice, Federation of Saskatchewan Indian Nations, Saskatoon, 12 June 1998. Judge Bria Huculak has also commented on the capacity of sentencing circles to open up a range of community-based justice possibilities: author interview with Judge Bria Huculak, Provincial Court of Saskatchewan, Saskatoon, 9 June 1998. On the other hand, Larry Chartrand has warned that the criminal justice system’s demonstrated capacity to make “allowances” for Aboriginal communities in the form circle sentencing might be used to justify opposition to the establishment of autonomous Aboriginal justice systems on the basis that the deficiencies of the mainstream justice system have been “fixed”: author interview with Professor Larry Chartrand, Faculty of Law, University of Ottawa, 4 June 1998.

³ *R v Nicholas*, [1996] WCBJ LEXIS 10757 (New Brunswick Provincial Court).

... [T]he Criminal Code makes no provision for the use of this particular type of process to determine sentence. In fact, the Criminal Code makes no provision for any particular type of sentencing hearing: the foundation for the conventional sentencing hearing as well as for the use of a sentencing circle (or other alternative forms of sentencing hearing) is case law.⁴

On the other hand, judges have had primary responsibility for establishing, approving and enforcing the ‘limits’ of circle sentencing by imposing tests on eligibility and rules on process.⁵ This article seeks to illuminate the inquiry as to the locus of decision-making via an analysis of the rules, criteria and guidelines which have been developed by judges for the conduct of sentencing circles at both the entry stage of the process—what cases are eligible for circle sentencing?—and the exit stage—what bearing do the circle’s deliberations and recommendations have on the final sentencing disposition?⁶

Section 2 provides an overview of the context of Aboriginal involvement in the criminal justice system from which ‘alternatives’ like circle sentencing have emerged. Section 3 maps out a theoretical framework for this article’s analysis of the locus of decision-making authority in circle sentencing based on the insights offered by the concept of legal pluralism. Section 4 outlines the nature of the practice of circle sentencing, with particular emphasis on the manner in which the practice has taken shape in the Yukon Territory and the province of Saskatchewan. Section 5 outlines and examines the rules, criteria and guidelines that have been developed for the use of circle sentencing. The main aim of this discussion will be to identify the respective roles played by judges and First Nation communities in the development of these rules and to examine the implications of these rules for the article’s primary concern with the locus of decision-making authority. Section 6 briefly considers the significance for circle sentencing of the addition of s 718.2(e) to the Criminal Code in 1996,⁷ particularly in light of the recent Supreme Court of Canada decision in *R v Gladue*.⁸ Section 7 summarises the article’s conclusions.

⁴ Ibid, para 5.

⁵ In addition appellate courts have begun to have an important impact via their handling of appeals against sentence in cases where the sentence was determined in a sentencing circle: see Luke McNamara, “Appellate Court Scrutiny of Circle Sentencing”, *Manitoba Law Journal* (forthcoming).

⁶ The analysis presented in this article draws on a variety of sources of written information: case reports, government reviews, reports produced by Aboriginal community organisations and published secondary literature. These written sources were supplemented with interviews (during May-June 1998) with a number of judges, community representatives and lawyers, involved in facilitating sentencing circles as part of the criminal court sentencing process. In addition interviews were conducted with representatives from Aboriginal organisations, officers from relevant territorial, provincial and federal government departments, academics and others with knowledge and expertise regarding the practice of circle sentencing and/or community justice generally.

⁷ Section 718.2(e) requires sentencing judges to taken into account, inter alia, the principle that “all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, *with particular attention to the circumstances of aboriginal offenders*”.

⁸ *R v Gladue* [1999] 1 SCR 688 (Supreme Court of Canada).

One final comment is necessary by way of introduction. This article is concerned with determining whether the practice of circle sentencing does involve a shift in the locus of decision-making authority, rather than whether any such shift is desirable from the point of view of the objectives of the Canadian criminal justice system, or adequate in light of the objectives and aspirations of First Nation communities in the area of justice administration.⁹ This point is worth clarifying at the outset, so as to avoid the appearance that this article assumes that the locus of decision-making authority is the only consideration relevant to an assessment of the merits of circle sentencing, or that it has been prepared in ignorance of concerns which have been raised in a variety of quarters about the practice of circle sentencing.¹⁰ Concerns raised by critics of sentencing circles include the negative impact of the practice on Aboriginal women (particularly where they are victims in domestic violence and sexual assault cases), the danger of weighting the process in favour of the offender and against the victim, the risk of local politics influencing the process so that it benefits certain families or the local elite in a community, and doubts about the effectiveness of circle sentencing in terms of reducing rates of crime and recidivism. In addition, concerns have been expressed that no adequate evaluation of circle sentencing has yet been undertaken to establish whether there is objective evidence of the claimed benefits of the practice.¹¹ The focus in this article on the locus

⁹ An evaluation of this sort would be neither appropriate nor feasible. Certainly as a non-Aboriginal (and non-Canadian) legal academic, I am in no position to undertake any such evaluation—particularly as I am strongly of the view (as a matter of political and legal opinion) that it is for the Aboriginal peoples of Canada, in exercise of the collective right to self-determination, to determine the manner in which anti-social behaviour and breaches of law are handled in their communities.

¹⁰ Despite the relative novelty of circle sentencing, there is already a substantial body of critical literature which points to perceived weaknesses, problems or dangers in circle sentencing. See, eg, Julian V Roberts and Carol LaPrairie, “Sentencing Circles: Some Unanswered Questions” (1996) 39 *Criminal Law Quarterly* 69; Carol LaPrairie, “Altering Course: New Directions in Criminal Justice – Sentencing Circles and Family Group Conferences” (1995) *The Australian and New Zealand Journal of Criminology* 78; and Carol LaPrairie, *Community Justice or Just Communities? Aboriginal Communities in Search of Justice* (Ottawa: Department of Justice, 1994); Mary Crnkovich, “A Sentencing Circle” (1996) 36 *Journal of Legal Pluralism* 159; and Evelyn Zellerer, “Community-Based Justice and Violence Against Women: Issues of Gender and Race” (1996) 20(2) *International Journal of Comparative and Applied Criminal Justice* 233.

¹¹ Consistent with the Saskatchewan Government’s “cautiously supportive” response to the emergence of circle sentencing (author interview with David Gullickson, Senior Policy Analyst, Policy, Planning and Evaluation Branch, Saskatchewan Justice, Regina, 10 June 1998) the Saskatchewan Department of Justice has indicated that the practice of circle sentencing should be submitted to thorough evaluation: see Saskatchewan Justice, Policy, Planning and Evaluation Branch, *Sentencing Circles: A Discussion Paper* (Regina, Saskatchewan Justice, June 1993). In co-operation with the Canadian Justice Department, Saskatchewan Justice has established data collection processes to facilitate such analysis and evaluation. See Campbell Research Associates, *Sentencing Circles – A Review*. Prepared for the Aboriginal Justice Directorate, Department of Justice Canada (March 1995); and Campbell Research Associates, *Sentencing Circle Database: Data Organization and Codebook*. Submitted to Aboriginal Justice Directorate, Department of Justice Canada (June 1995). Some very preliminary evaluative data is contained in Saskatchewan Justice, Policy, Planning and Evaluation Branch, *Aboriginal Justice Strategy: Interim Report, February 1998* (Regina, Saskatchewan Justice, 1998) (discussed further below). Bazemore and Griffiths have noted that while evaluation of community justice programs like circle sentencing is desirable it is necessary to recognise that “Many restorative and community justice

of decision-making authority has been adopted with an awareness that this represents but one of the considerations relevant to any evaluation of the merits of circle sentencing.

2. BACKGROUND: LAW REFORM RESPONSES TO ABORIGINAL CRIMINAL JUSTICE EXPERIENCES

It is an undeniable reality that Aboriginal people suffer disproportionately at the hands of the dominant criminal justice system in post-colonial settler societies such as Canada. A great deal of energy has been invested during the last decade in confirming the facts of Aboriginal over-representation, disadvantage and injustice, and in proposing 'solutions' to these problems.

A recurring theme of many of the major public inquiries undertaken during this time (such as the Royal Commission on Aboriginal Peoples in Canada¹²) has been the identification of a causal relationship between the specific forms of injustice suffered by Aboriginal people at the hands of the dominant criminal justice system and the more general subordination of Indigenous peoples' legal authority that characterised the colonial process and which continues to define European/Indigenous relations in post-colonial settler states. That is, the suppression of Aboriginal laws and

initiatives have objectives that are far more holistic than traditional crime control responses which have typically utilized recidivism rates as a primary outcome measure. An evaluative framework for these approaches would, therefore, have to include measurable criteria to assess outcomes of 'community empowerment and solidarity', 'victim interests' and 'crime prevention': Gordon Bazemore and Curt Taylor Griffiths, "Conferences, Circle, Boards & Mediations: Scouting the 'New Wave' of Community Justice Decisionmaking Approaches" (1997) [www.cjprimer.com/circles.html]. See also Judge Barry Stuart, "Circle Sentencing in Yukon Territory, Canada: A Partnership of the Community and the Criminal Justice System" (1996) 20 *International Journal of Comparative and Applied Criminology* 291 at 293-294. Scepticism on the part of circle sentencing practitioners (including some judges) as to whether government-sponsored evaluation will adequately take these factors into account has contributed to a reluctance to support government evaluation projects. Bazemore and Griffiths also stress that the effectiveness of community justice initiatives must be compared with "the reality of the current system rather than an idealized version of its performance": *ibid.* Judge Heino Lilles, one of the leading judicial proponents of circle sentencing, has similarly observed that the 'success' of circle sentencing must be measured against the demonstrated failure of the conventional criminal justice system to deliver justice and reduce crime, particularly in Aboriginal communities: author interview with Judge Heino Lilles, Territorial Court of Yukon, Whitehorse, 25 May 1998; see also Heino Lilles, "A Plea for More Humane Values In Our Justice System" (1992) 17 *Queen's LJ* 328; and Heino Lilles, "Dawn or Dusk in Sentencing", paper presented at the Canadian Institute for the Administration of Justice Conference, Montreal, 24-26 April 1997. Judge Bria Huculak has also argued that measures of success must be appropriate and realistic. On the question of recidivism rates Judge Huculak has pointed out that it is important to focus not simply on whether individuals reoffend, but whether they commit offences of the same type and seriousness: author interview with Judge Bria Huculak, Provincial Court of Saskatchewan, Saskatoon, 9 June 1998.

¹² RCAP, *op cit.*

the denial of Aboriginal self-determination underpins contemporary problems of Aboriginal recidivism and over-representation in the criminal justice system.¹³

The identification and exploration of this relationship has underpinned the articulation of an approach to justice reform which eschews the conventional and inherently limited strategy of merely ‘tinkering’ with, or ‘fine-tuning’ the dominant principles and institutions of the prevailing (central) regime of non-Aboriginal criminal law.¹⁴ Instead, genuine improvement in the ways in which Aboriginal people ‘experience’ justice is seen to be contingent on a reshaping of the framework for the resolution of disputes and the maintenance of social order—a reconfiguration of the acceptable parameters of legitimate social control mechanisms which leaves room for the operation of Aboriginal laws and values, which is consistent with the exercise of Aboriginal self-determination, and which demonstrates a commitment to pluralist justice.

Practical change along these lines has been slow and limited. Moreover, justice reform based on (varying degrees of) recognition of Aboriginal laws and processes have tended to occur alongside, rather than as a result of, the concerted efforts of law reform inquiries such as have been conducted by the Law Reform Commission of Canada¹⁵ the Aboriginal Justice Inquiry of Manitoba¹⁶ and the Royal Commission on Aboriginal Peoples.¹⁷ That is, the implementation of processes which acknowledge the legitimacy and relevance of Aboriginal laws, justice values and processes in criminal cases involving Aboriginal defendants has frequently been an *ad hoc* judicial response, in co-operation with particular First Nation communities rather than a deliberate course of progressive law reform embarked upon by legislatures or executive governments.¹⁸ This is true of circle sentencing. This point is worth making

¹³ In Australia, the Royal Commission into Aboriginal Deaths in Custody reached a similar conclusion. See Royal Commission into Aboriginal Deaths in Custody, *National Report* (Canberra: Australian Government Publishing Service, 1991).

¹⁴ Luke McNamara, *Aboriginal Peoples, the Administration of Justice, and the Autonomy Agenda: An Assessment of the Status of Criminal Justice Reform in Canada With Reference to the Prairie Region*. Research Report No. 4 (Winnipeg: Legal Research Institute of the University of Manitoba, 1993).

¹⁵ LRCC, op cit.

¹⁶ AJIM, op cit.

¹⁷ RCAP, op cit.

¹⁸ There are exceptions to this general pattern. For example, in the Yukon the Canadian Justice Department (in co-operation with the Yukon Justice Department) is currently negotiating with interested First Nations over the devolution of responsibility for justice administration in the context of the settlement of comprehensive land and self-government claims. One such First Nation is the Teslin Tlingit First Nation. In May 1993 tripartite agreement was reached on land (*Teslin Tlingit Council Final Agreement* (Ottawa, DIAND, 1993)) and self-government (*The Teslin Tlingit Council Self-Government Agreement* (Ottawa: DIAND, 1993)). Section 13.3.17 of the Self-Government Agreement provides that “The Teslin Tlingit Council shall have the power to enact laws ... in relation to the ... administration of justice”. This power will be exercisable commencing in the year 2000. In June 1997 negotiations commenced over the terms of the devolution of responsibility for justice administration, and in April 1998 a Framework Agreement on the Process to Negotiate Teslin Tlingit Council Justice Agreements was completed. The objectives of the Teslin Tlingit Council, as outlined in the framework agreement, include the establishment of a Teslin Tlingit Council Court which will incrementally

at the outset because it does indicate that there is frequently considerable distance between the agenda and mechanics of ‘mainstream’ law reform on the one hand, and on the other, the means by which actual change occurs—particularly in the area of community justice.

3. LEGAL PLURALISM: AN ANALYTICAL FRAMEWORK FOR EXAMINING ABORIGINAL COMMUNITY JUSTICE

In the context of examinations of the experience of Indigenous peoples under the legal and governmental systems of post-colonial settler states, the term ‘legal pluralism’ is commonly used to denote a desired (or less commonly, achieved) state of affairs characterised by a ‘fair and just’ relationship between Indigenous and non-Indigenous legal systems rather than continuation of the colonial pattern of subordination of Indigenous legal cultures.¹⁹ What this brief account of the significance of the term ‘legal pluralism’ does not reveal is that the concept of legal pluralism is controversial and contested—it is a concept which provokes strong reaction on the part of both adherents and critics. Therefore, before considering the utility of the concept as a framework for examining the practice of Aboriginal community based justice in the form of circle sentencing, further consideration of the concept of legal pluralism is necessary.

Divergent views as to the utility of the concept reflect, in part, different definitions of the term, and the manner in which the concept has evolved. While it would be simplistic to reduce the debate to a disagreement over semantics, any consideration of the concept of legal pluralism must begin with the fundamental and complex question of definition.

The concept of legal pluralism has been variously explained in the literature. Manderson has succinctly stated that “In its simplest form, legal pluralism posits that more than one legal order inhabits the same physical territory”.²⁰ According to Merry legal pluralism is “generally defined as a situation in which two or more legal systems coexist in the same social field. ... Recent work defines ‘legal system’ broadly to include the system of courts and judges supported by the state as well as nonlegal forms of normative ordering. ... Thus, virtually every society is legally plural.”²¹ In a similar vein Griffiths has observed that “Legal pluralism is an attribute of a social

assume responsibility for justice administration functions within the jurisdiction of the Teslin Tlingit Council.

¹⁹ See RCAP, op cit, 233.

²⁰ Desmond Manderson, “Beyond the Provincial: Space, Aesthetics, and Modernist Legal Theory” (1996) 20 *Melbourne University Law Review* 1048 at 1059.

²¹ Sally Engle Merry, “Legal Pluralism” (1988) *Law and Society Review* 869 at 871.

field and not of 'law' or of a 'legal system'. ... It is when in a social field more than one source of 'law', more than one 'legal order', is observable, that the social order of that field can be said to exhibit legal pluralism. ... [L]egal pluralism is a universal feature of social organization."²² Sack offers the important additional insights that "Legal pluralism is more than the acceptance of a plurality of law; it sees this plurality as a positive force to be utilised—and controlled—rather than eliminated. Legal pluralism thus involves an ideological commitment."²³

Critiques of the concept of legal pluralism (both sympathetic and hostile) have come from a variety of perspectives. For example, Tamanaha has argued that "the concept of legal pluralism is constructed upon an unstable analytical foundation which will ultimately lead to its demise."²⁴ Specifically, Tamanaha takes issue with what he characterises as the "threshold flaw" of legal pluralism: the core notion that the "legal system" includes "*non-legal* forms of normative ordering."²⁵ For Tamanaha "so generous a view of what law is"²⁶ is unacceptable because the term "'law' thereby lose[s] any distinctive meaning."²⁷ Put simply, Tamanaha's criticism of legal pluralism reflects his view that the term 'law' should only be used to refer to state law, not non-state normative orders. Even if this critique is meritorious in particular contexts (eg Tamanaha uses the extreme example of "table manners" as a set of rules which should not be described as 'law') it by no means follows that the rules and social values of Aboriginal peoples cannot accurately and appropriately be described as 'law'. Tamanaha's approach carries a great risk of perpetuating the colonial ideology and practices which saw Aboriginal legal systems denigrated and subordinated as (at best) 'lore' and 'custom'.

From a very different perspective Maori lawyer Moana Jackson has criticised the concept of legal pluralism on the basis that it "is inherently assimilative and racist."²⁸ In particular Jackson is critical of the belated, selective and carefully circumscribed manner in which laws, values and rights of Indigenous peoples have been acknowledged by the colonising state under the guise of 'legal pluralism' so that colonial domination is continued rather than rejected via the state's formal embrace of legal pluralism.²⁹ Arguably, Jackson's concerns about legal pluralism relate less to its

²² John Griffiths, "What is Legal Pluralism?" (1986) 24 *Journal of Legal Pluralism* 1 at 38.

²³ Peter Sack, "Legal Pluralism: Introductory Comments" in Peter Sack and Elizabeth Minchin (eds), *Legal Pluralism: Proceedings of the Canberra Law Workshop VII* (Canberra: Law Department, Research School of Social Sciences, Australian National University, 1988), 1.

²⁴ Brian Tamanaha, "The Folly of the 'Social Scientific' Concept of Legal Pluralism" (1993) 20(2) *Journal of Law and Society* 192.

²⁵ Ibid, 193 quoting Merry, op cit, 870 (emphasis added by Tamanaha).

²⁶ Ibid.

²⁷ Ibid.

²⁸ Moana Jackson, "Changing Realities: Unchanging Truths" (1994) 10 *Australian Journal of Law and Society* 115 at 116.

²⁹ Ibid.

utility as a concept for exploring and investigating the existence of a range of normative orders within a society (including Indigenous legal systems) than to the appropriation of the language of ‘legal pluralism’ by post-colonial states as a vehicle for continuing the colonial project of marginalisation and subordination of Indigenous peoples’ legal values, rules and institutions.

What these various formulations of (and judgements on) the concept of legal pluralism reveal is a diversity of opinions on both the nature and value of the concept. Does it refer to the political aspirations of oppressed minorities, and in particular Indigenous peoples who have suffered under colonisation? Does it merely refer to the multiplicity of normative orders in any society? If so, is it simply an empirical label, without political significance? Or does the ideology of opposition to ‘legal centrism’ have practical implications for law and law reform? Is it a rhetorical (and frequently misleading) assertion on the part of the state about the capacity of the dominant legal system to deliver justice to minority groups? Is it a ‘vehicle’ for the continuation of the colonial project?

The answer for present purposes—that is, the relationship between Aboriginal law and processes and state criminal law and processes in Canada—is that the term legal pluralism is of some relevance in all these respects. But this does not sufficiently address the divergence in meaning. To this end, regard must be had to the evolution of the concept of legal pluralism in legal anthropology. As Merry has observed:

The intellectual odyssey of the concept of legal pluralism moves from the discovery of indigenous forms of law among remote African villagers and New Guinea tribesmen to debates concerning the pluralistic qualities of law under advanced capitalism. In the last decade, the concept of legal pluralism has been applied to the study of social and legal ordering in urban industrial societies, primarily the United States, Britain, and France. Indeed, given a sufficiently broad definition of the term legal system, virtually every society is legally plural, whether or not it has a colonial past. Legal pluralism is a central theme in the reconceptualization of the law/society relation.³⁰

Within this process of evolution and development, Merry identifies two phases of legal pluralism. The first, “classic legal pluralism”, was concerned with “the analysis of the intersections of indigenous and European law” in colonial and post-colonial contexts. The second, “new legal pluralism”, espouses that “plural normative orders are found in virtually all societies”.³¹

³⁰ Merry, *op cit*, 869; see also Manderson, *op cit*, 1059.

³¹ Merry, *op cit*, 872.

Upon this classic/new paradigm it is possible to superimpose a distinction that has been drawn between the “juristic” view of legal pluralism and the “social science” view of legal pluralism. The former is said to be concerned with the particular terms of the formal relationship (that is, as reflected in the state legal system) between Indigenous law and the imposed law of the coloniser. The latter is a descriptive theory for identifying an empirical state of affairs.

For Griffiths the former is, at best, only a ‘weak’ version of legal pluralism, because it offers no challenge to the ideology of “legal centralism”. By contrast the “social science” version of legal pluralism is legal pluralism in the ‘strong’ sense. It aims to

break the stranglehold of the idea that what law is, is a single, unified and exclusive hierarchical normative ordering depending from the power of the state, and of the illusion that the legal world actually looks the way such a conception requires it to look.³²

Given its association with what leading scholars of legal pluralism have characterised as the ‘classic’ and ‘weak’ notion of legal pluralism (with implications of inferiority, irrelevance and anachronism) it is perhaps not surprisingly that the question of the status of the laws and legal systems of Indigenous peoples within post-colonial states is presently a somewhat unfashionable focus for analyses from the perspective of contemporary legal pluralism. This is unfortunate for two reasons.

First, even if, for the sake of argument, the ascendancy of the social science view of legal pluralism is conceded, Indigenous peoples and their normative orders are not thereby disqualified as appropriate fields of inquiry for proponents of this ‘new’ legal pluralism. Aboriginal law (encompassing both substantive rules as well as processes) *is* a matter of empirical reality for First Nation peoples in Canada, irrespective of whether the relevant state legal system can be said to be pluralist in the juristic sense. Therefore, the nature of contemporary Aboriginal law and its relationship with other forms of law (including state criminal law) need not be considered ‘off-limits’ by those concerned with legal pluralism in the ‘strong sense’.

Second, the rise of ‘new’ legal pluralism need not signal the complete demise of its ‘classic’ equivalent. While it may be fair to say that “legal pluralism goes far deeper than the joining of European and traditional forms of law”³³ it by no means follows that legal pluralism has outgrown its utility as a concept for exploring the Indigenous/coloniser relationship. Indeed, there are good reasons why, particularly in relation to analyses of contemporary struggles by Indigenous people over law and

³² Griffiths, *op cit*, 4-5.

³³ Merry, *op cit*, 870.

justice issues, the nexus between classic/new, juristic/social science, and weak/strong should not be severed. For example, the concept of legal pluralism in the juristic sense highlights the reality of state power and coercion, which underscored the Indigenous/coloniser relationship and which continues to underscore the Indigenous/post-colonial state relationship. As Manderson has observed, “The first stage of ‘modern pluralism’ [ie Merry’s classic legal pluralism] was motivated by a clear political agenda ... Whether in colonial societies, Brazil or the inner city, ‘pluralism’ stood for resistance to the established legal order”.³⁴ The social science version of legal pluralism tends to underemphasise this factor—deliberately, it would seem, but nonetheless problematically.³⁵ As Alan Hunt has observed, while it is important to “recognize the diversity of legal phenomena and avoid falling into the presumption of a unitary entity ‘the Law’”, it is also important “to give due recognition to the importance of both the state as a political agency and to state-law.”³⁶ More specifically Hunt has emphasised the need to “address the specific articulation between state-law and non-state law”.³⁷

Given the concerns of this article—the relationship between state criminal laws and processes, and the criminal laws and processes of First Nations, with specific reference to the practice of circle sentencing—it seems necessary and appropriate to consider the utility of the concept of legal pluralism in two senses. First, the concept of legal pluralism is useful as a social descriptor—for identifying and highlighting the multiplicities of laws/normative orders operating in a given context. Second, legal pluralism has value as a legal ‘barometer’—for characterising the relationship between Indigenous laws and state laws, so that it is possible to speak of the presence or absence of legal pluralism (in lesser or greater degrees) in any given state’s legal system, or specifically, system of criminal justice administration.

Utilisation of the concept in both these respects has important benefits from the point of view of facilitating a constructive analysis of community justice initiatives such as circle sentencing: the versions can be mutually compatible rather than contradictory or mutually exclusive. For example, as a *social* descriptor, legal pluralism is a valuable tool for breaking down the law/lore distinction which has hindered acceptance of the authenticity and legitimacy of Indigenous laws and justice processes. As a *legal* barometer, legal pluralism arguably offers greater political currency in that it constitutes a measure for assessing the capacity of existing legal

³⁴ Manderson, op cit, 1060.

³⁵ Thanks to Paul Havemann for first prompting this insight.

³⁶ Alan Hunt, *Explorations in Law and Society: Toward a Constitutive Theory of Law* (New York: Routledge, 1993), 307.

³⁷ Ibid, 323.

regimes to deliver justice to Indigenous people, using criteria including the degree of compatibility with Indigenous laws and processes.

Of course, in suggesting that legal pluralism can be used as a measure of ‘justice’ for Indigenous people, including in the context of criminal law, it will be crucial what criteria are employed in any such assessment. Williams has noted that “a facade of legal pluralism may conceal a reality of monocultural legal domination” and issued “a warning for scholars to be cautious in their analysis of attempts by a modern state legal system to operate in a pluralistic manner.”³⁸ Mindful of this warning, this article will utilise the concept of legal pluralism as an analytical perspective from which to examine the practice of circle sentencing.

At first glance, the concept of legal pluralism and the practice of circle sentencing may not appear to have much in common. One might ask, ‘surely a practice which is only concerned with determining the *sentence* for a criminal offence and not *liability* for the criminal offence, and where the judge retains ultimate decision-making authority, can’t be considered an illustration of legal pluralism’. This may be a reasonable *conclusion* but it is an unsatisfactory presumption or starting point. This article aims to closely and critically examine the rules which have been developed to ‘shape’ the practice of circle sentencing, in order to establish a foundation for answering a key question: to what extent does circle sentencing involve a significant shift in the site of decision-making authority out of the hands of judges and the mainstream criminal justice system, and into the hands of First Nation communities. This task is undertaken with full recognition of the inherent paradox of reform strategies which attempt to recognise Aboriginal authority over law and justice matters *within* the parameters of the non-Aboriginal legal system. A detailed understanding of the terms of the resulting compromise is necessary in order to evaluate the significance of the emergence of circle sentencing as an established feature of the Canadian criminal justice system.

4. THE ORIGINS AND CURRENT PRACTICE OF CIRCLE SENTENCING

In its 1996 report on the criminal justice system, *Bridging the Cultural Divide*, the Royal Commission on Aboriginal Peoples simply but accurately described circle sentencing as a meeting where “individuals are invited to sit in a circle with the accused and discuss together what sentences should be imposed”.³⁹ This description

³⁸ David Williams, “The Recognition of ‘Native Custom’ in Tanganyika and New Zealand — Legal Pluralism or Monocultural Imposition” in Sack & Minchin, *op cit*, 152. See also David Williams, “The Waitangi Tribunal and Legal Pluralism: A Reassessment” (1994) 10 *Australian Journal of Law and Society* 195; and Jackson, *op cit*.

³⁹ RCAP, *op cit*, 110.

effectively conveys the ‘bare bones’ of what happens in sentencing circles, but of course it does not reveal the considerable variations—court to court, community to community, and case to case—in the forms of the practice of circle sentencing which have been employed in many communities across Canada in recent years. In a similar vein, the purpose of the overview of the origins and practice of circle sentencing which is offered in this section of the article is not to provide a comprehensive account of how circle sentencing works,⁴⁰ but to establish a basis for consideration of particular aspects of the process of circle sentencing in the remainder of this article. By necessity then, the account of circle sentencing will be generalised in nature.

The recent origins of the practice of circle sentencing can be found in the Yukon where it was initiated in 1992 by Judge Barry Stuart of the Yukon Territorial Court in co-operation with a number of First Nation communities across the territory.⁴¹ The motivation for Stuart J (and subsequently other judges in the territory, including Judge Heino Lilles) and members of First Nation communities deciding to look for alternatives was simple: overwhelming evidence that the conventional criminal justice process was failing, nowhere more dismally than in those First Nation communities ‘serviced’ by circuit courts. As Stuart J observed in *R v Moses*⁴² — the first circle sentencing convened in the Canadian criminal justice system and the prototypes on which many sentencing circles across the country have been modelled — “no one can contend ‘circuit court’s work’; no one can deny that the system squanders money and lives unnecessarily with dubious success in either protecting or improving the community.”⁴³

The sentencing circle format, then, was developed as an *alternative* to the conventional (and demonstrably ineffective) sentencing hearing where the judge, after hearing submissions from Crown and defence counsel and considering reports and/or testimony from relevant experts and other interested parties, makes a decision on his/her own and imposes a sentence on the offender. Participants in a sentencing circle

⁴⁰ For a detailed explanation of circle sentencing by the judge who initiated the practice in co-operation with First Nation communities in the Yukon, see Barry Stuart, *Building Community Justice Partnerships: Community Peacemaking Circles* (Ottawa: Aboriginal Justice Learning Network, Justice Canada, 1997); and Stuart (1996), op cit. See also Ross Gordon Green, *Justice in Aboriginal Communities: Sentencing Alternatives* (Saskatoon: Purich Publishing, 1998), chapter 5 “The Sentencing Circle”.

⁴¹ Some of the factors regarding the administration of justice in the Yukon Territory which have prompted judges of the Yukon Territorial Court (particularly Stuart and Lilles JJ) to encourage community-based approaches to sentencing in First Nation communities are outlined by Stuart J in *R v N(D)* (1993), 27 CR (4th) 114 at 127-32.

⁴² *R v Moses* (1992), 71 CCC (3d) 347 (Yukon Territorial Court).

⁴³ Ibid, 384. For a similar characterisation of the circuit court system in northern Saskatchewan, see Judge Claude Fafard in Maureen Nicholson (ed), *Justice and Northern Families: In Crisis ... In Healing ... In Control* (Vancouver: The Northern Justice Society and Simon Fraser University, 1994) 53; and Green, op cit, 38-42.

usually include the offender, the judge,⁴⁴ the victim, the prosecutor and the defendant's lawyer, along with a cross-section of the community (including family members of the offender and the victim). The objective of the process is to allow for direct community involvement in the sentencing process, with a view to arriving at an appropriate sentence, which reflects, where achieved, the consensus view of the circle.

While circle sentencing involves a conscious departure from a number of the practices which define the conventional style of sentencing, it remains, formally and legally, a sentencing hearing within the court system. Consequently, certain procedures are retained, including the receipt and marking as exhibits of criminal record documentation or other reports, the recording or proceedings, the judicial determination of disputed facts "in the usual manner through evidence heard under oath" and the openness of the proceedings to the public.⁴⁵

Consistent with the consultative and community-based nature of the process, circle sentencing necessitates a physical rearrangement of the court room. In *Moses*, Stuart J explained the rationale for altering the physical layout of the courtroom:

In any decision-making process, power, control, the over-all atmosphere and dynamics are significantly influenced by the physical setting, and especially by the places accorded to participants. ... In the criminal justice process ... the physical arrangement in a court-room profoundly affects who participates and how they participate. The organization of the court-room influences the content, scope and importance of information provided to the court. The rules governing the court hearing reinforce the allocation of power and influence fostered by the physical setting. The combined effect of the rules and the court-room arrangements entrench the adversarial nature of the process. The judge, defence and Crown counsel, fortified by their prominent places in the court-room and by the rules, own and control the process and no one in the court-room can have any doubt about that.⁴⁶

Of course, the departure from the conventional sentencing hearing which circle sentencing represents involves more than merely altering the seating arrangements, but according to Stuart J this simple change was the catalyst for a significant change in the sentencing decision-making process. Stuart J explained that, in *Moses*, when the physical arrangement of the courtroom was altered so that all participants were sitting "in a circle without desks or tables ... the dynamics of the decision-making process were profoundly changed."⁴⁷

⁴⁴ The terms 'circle sentencing' is sometimes used to refer to a community consultation where the judge does not attend or participate in the circle but receives and considers a sentencing recommendation from the circle.

⁴⁵ *R v Gingell* (1996), 50 CR (4th) 326 (Yukon Territorial Court) per Lilles J.

⁴⁶ *Moses*, op cit, 355.

⁴⁷ Ibid, 356.

Word of this new approach to doing justice in First Nation communities soon spread, to other parts of the Yukon and to other provinces. Harold Gatensby, member of the Carcross Tagish First Nation's Justice Committee,⁴⁸ has explained that when Judge Stuart suggested that circle sentencing be conducted in the Carcross community there was immediate enthusiasm for the idea and a desire to start immediately, such was the extent of the community's need.⁴⁹ Gatensby has stated:

People ask, "How do you get started? We don't have the funding. We don't have the resources. What do you do?" What we did in our community was we put all the chairs in a circle and sat down. That is all. And it works.⁵⁰

Apart from the Yukon Territory, the jurisdiction in which circle sentencing has been most widely used is the province of Saskatchewan. The first Saskatchewan sentencing circle was held in July 1992 in the community of Sandy Bay in a case in the Provincial Court of Saskatchewan presided over by Fafard J.⁵¹ Fafard J made the initial suggestion, which was supported by members of the community.⁵² Fafard J has reported that he first heard of Stuart J's use of circle sentencing via a newspaper account of the *Moses* case and "The idea appealed to me right off the bat".⁵³

One of the community participants in the first circle held at Sandy Bay has explained the approach adopted at the inception of circle sentencing:

Well, we just kind of played it by ear. There was no set guidelines or nothing. We just said "Okay, we'll deal with him, [the offender]." ... [We got] a good mix of people, some young, middle-aged, elders, the RCMP, the magistrate [judge], ... the accused and his family. And we just hacked it out ... But, instead of looking at punishing the guy, we looked at what's causing him to do these things.⁵⁴

The practice of circle sentencing (in a variety of forms) has since been adopted and adapted by criminal courts and Aboriginal communities in many parts of the country, and has been described by the Chief Justice of the Saskatchewan Court of

⁴⁸ Now known as the Southern Lakes Justice Committee.

⁴⁹ See "Circles" (National Film Board of Canada, 1997).

⁵⁰ Harold Gatensby, in Nicholson, op cit, 16.

⁵¹ See *R v Joseyounen*, [1996] 1 CNLR 182 at 183. See also Green, op cit, 95-101.

⁵² See Green, op cit, 96. Fafard J has commented that "The idea, of course, belongs to the Native people from time immemorial. So, we shouldn't give too much credit to the judges!": in Nicholson, op cit, 50.

⁵³ Fafard J in Nicholson, op cit, 50.

⁵⁴ Harry Morin, quoted in Green, op cit, 96.

Appeal as “part of the fabric of our system of criminal justice and ... a recognized and accepted procedure”.⁵⁵

In *Moses* Stuart J identified a number of benefits of circle sentencing as a mode of decision-making,⁵⁶ including that it:

- challenges the monopoly of professionals;
- enhances the range and quality of information on which a sentencing decision can be made;
- increases the likelihood that creation sentencing options will be identified;
- promotes shared responsibility for the making and implementation of sentencing decisions;
- encourages offender and victim participation in the sentencing decision;
- facilitates improved understanding of the limitations of the conventional justice system;
- broadens the conventional criminal justice system’s narrow focus on the conduct of the offender;
- encourages identification of productive ways to use community resources; and
- involves greater recognition of Aboriginal cultures and values.

This final benefit identified by Stuart J is of particular relevance here given that this article is concerned with examining circle sentencing through the lens of legal pluralism. In *Moses* Stuart J explained this benefit of circle sentencing as follows:

Aboriginal culture does not place as high a premium on individual responsibility or approach conflict in the direct confrontational manner championed by our adversarial process. Aboriginal people see value in avoiding confrontation and in refraining from speaking publicly against each other. In dealing with conflict, emphasis is placed on reconciliation, the restoration of harmony and the removal of underlying pressures generating conflict. ... The circle contributes the basis for developing a genuine partnership between aboriginal communities and the justice system by according the flexibility for both sets of values to influence the decision-making process in sentencing.⁵⁷

The choice of the *circle* as the conceptual, physical and procedural framework for the reworking of criminal justice administration by circuit courts in the Yukon was not accidental. That the circle carries philosophical, spiritual and cultural significance for

⁵⁵ Chief Justice Bayda, in *R v Morin*, [1995] 4 CNLR 37 (Saskatchewan Court of Appeal) at 68, 69.

⁵⁶ See *Moses*, op cit, 357-67. See Hugh J Benevides, “*R v Moses* and Sentencing Circles: A Case Comment” (1994) *Dalhousie J of Legal Studies* 241; and Kathleen Makela, “Case Summary: *R v Moses*”, *Justice as Healing* (Spring 1995) [also at http://www.usask.ca/nativelaw/jah_makela.htm].

⁵⁷ *Moses*, op cit, 366-67.

many First Nations in Canada is widely recognised. What has been more controversial is whether the circle sentencing is appropriately seen as a product of First Nations' legal cultures based on 'traditional' methods of dispute resolution and decision-making in Aboriginal communities, or alternatively, whether circle sentencing is more accurately characterised as the creation of a progressive minority within the Canadian judiciary? In a political context where sentencing circles have been depicted by some critics as a 'soft option' designed to allow Aboriginal offenders to 'get off easy',⁵⁸ questions about the 'cultural authenticity' of circle sentencing have implications beyond the issue of anthropological accuracy.

A number of commentators have emphasised the connections between First Nations' cultures and circle sentencing. The Royal Commission on Aboriginal Peoples described the introduction of circle sentencing as "a decision to return, in a fashion, to the way justice was done before the arrival of the non-Aboriginal legal system. The return to more traditional approaches [has] led to an opening up of the sentencing process to greater community input".⁵⁹ Similarly, Tim Quigley has described sentencing circles as an example of "the rejuvenation of procedures and, to some extent, dispositions traditionally practised by some Aboriginal Peoples in this country".⁶⁰ Larry Chartrand has explained, that "the very purpose of the circle sentencing process ... is to have the aboriginal community regain a measure of control over the justice system in a manner more conducive to its traditional methods of dispute resolution."⁶¹ More cautiously, Curt Taylor Griffiths has noted, "Restorative justice initiatives in Aboriginal communities [such as circle sentencing] may be, but are not necessarily, premised on customary law and traditional practices".⁶²

On the other hand, Carol LaPrairie, a prominent critic of sentencing circles, has argued that sentencing circles are "not aboriginal-community driven but the

⁵⁸ See, eg, Donella Hoffman, "Easy Time? Debating Sentencing Circles", *The [Saskatoon] StarPhoenix*, 19 September 1995, A1; "Sentencing circle ruling helps man side-step jail", *The [Saskatoon] StarPhoenix*, 12 January 1995, B6; Sean Fine, "Consensus sentencing a controversial tool in aboriginal trials", *The [Toronto] Globe and Mail*, 31 May 1995, A3. See also Judge Cunliffe Barnett, "Circle Sentencing/Alternative Sentencing" [1995] 3 CNLR 1 at 4 where Judge Barnett, of the Provincial Court of British Columbia and a judicial proponent of circle sentencing, observes that "Some persons believe that the real purpose of alternative sentencing endeavours is to shelter Native offenders (usually male) from the full force of the law. They believe that alternative sentencing thereby fails to protect victims (usually Native women). There is sometimes too much truth to these beliefs ..."

⁵⁹ RCAP, op cit.

⁶⁰ Tim Quigley, "Some Issues in Sentencing of Aboriginal Offenders" in Richard Gosse, James Youngblood Henderson and Roger Carter (eds), *Continuing Poundmaker & Riel's Quest: Presentations Made at a Conference on Aboriginal Peoples and Justice* (Saskatoon: Purich Publishing and the College of Law, University of Saskatchewan, 1994) 269 at 287.

⁶¹ Larry Chartrand, "The Appropriateness of the Lawyer as Advocate in Contemporary Aboriginal Justice Initiatives" (1995) 33(4) *Alberta Law Review* 874 at 878.

⁶² Curt Taylor Griffiths, "Sanctioning and Healing: Restorative Justice in Canadian Aboriginal Communities" (1996) 20(2) *International Journal of Comparative and Applied Criminal Justice* 195 at 200. See also Green, op cit; and Craig Proulx, *Interrogating Justice: A Cultural Critique* (MA Thesis, University of Western Ontario, 1997).

innovation of certain reform-minded judges.”⁶³ This criticism assumes, rather simplistically, that judicial *initiation* is necessarily inconsistent with community *ownership*. The example of the development of circle sentencing in the Carcross First Nation, discussed above, illustrates that this need not be so. Of course, it is crucial, as Harold Gatensby has noted,⁶⁴ that community justice initiatives such as circle sentencing be based in the community. However, the mere fact that a particular initiative develops out of the suggestion of a judge is hardly an insurmountable barrier to this occurring. What is crucial is whether the community is receptive to the suggestion and how the project subsequently takes shape. As Judge Heino Lilles has observed, with reference to the importance of community ownership, “it is imperative that those individuals involved in initiating the project give up control, share credit with others and constantly reinforce the initiative as one belonging to and involving the whole community”.⁶⁵

Other commentators have questioned the ready assumption that community-based justice initiatives are necessarily a product of an Aboriginal people’s culture. For example, Mary Crnkovich has observed, with specific reference to the Inuit of northern Québec:

There appears to be some confusion between Inuit-based and community-based justice initiatives. The fact that Inuit are the majority within the community does not necessarily make a community-based initiative an Inuit-based initiative. In fact very few of the community-based initiatives are rooted in Inuit tradition. Adult diversion and circle sentencing are not Inuit traditions. For alternatives to be Inuit-based, Inuit must be allowed to design and implement them. Those within the justice system who endorse alternatives must be willing to allow their models to be reconstructed to reflect Inuit values and traditions.⁶⁶

Certainly, the point that it is important to avoid any tendency towards overgeneralisation and homogenisation when considering distinctive and diverse Aboriginal legal cultures is well made. However, it is equally clear that a number of First Nations *do* see circle sentencing as having its origins in their culture. For

⁶³ Carol LaPrairie, “Sentencing Circles and Family Group Conferences: Response to Jenny Borgen” (1996) 29 (1) *The Australian and New Zealand Journal of Criminology* 74.

⁶⁴ Author interview with Harold Gatensby, Southern Lakes Justice Committee, Carcross, 26 May 1998.

⁶⁵ Lilles, *op cit* (1997) p 15. Arnold Blackstar of the Federation of Saskatchewan Indian Nations has observed that community justice initiatives which remain ‘judge driven’ are unlikely to ‘take root’ in the community: author interview with Arnold Blackstar, Director of Community Services, Federation of Saskatchewan Indian Nations, Saskatoon, 12 June 1998.

⁶⁶ Crnkovich, *op cit*, 174.

example, in *R v C (LM)*⁶⁷ the mediator of the circle, Morris Little Wolf from the Peigan band, testified that the process had been used for over 500 years.⁶⁸

Judicial opinions on the topic vary considerably, even amongst strong advocates and active proponents of circle sentencing. For example, Judge Bria Huculak, one of the Provincial Court judges heavily involved in the development of circle sentencing in northern Saskatchewan, has stated that “the use of sentencing circles in Saskatchewan was primarily a judicial initiative, in that the judges encouraged, promoted and developed the procedural framework for the process.”⁶⁹ Judge Linton Smith, also of the Provincial Court of Saskatchewan, has argued, based on his experience with First Nation communities in the southern part of the province, that there is a significant relationship between circles and Aboriginal culture and has emphasised the spiritual dimension of the process of circle sentencing.⁷⁰

Despite such differences of opinion, it is fair to say that a significant number of judges in various parts of the country have (at a minimum) effectively taken ‘judicial notice’ of the origins of circle sentencing in First Nations’ legal cultures. For example, in *R v Morin* Bayda CJ emphasised the long history and cultural origins of circle sentencing:

The sentencing circle has its genesis in the healing circle which from time immemorial has been a part of the culture of many First Nations of Canada and of the indigenous peoples of other countries. ... The circle was premised on two fundamental notions: first, the wrongful act was a breach of the relationship between the wrongdoer and the victim and a breach of the relationship between the wrongdoer and the community; and second, the well-being of the community and consequently the protection of its members and the society generally depended not upon retribution or punishment of the wrongdoer, but upon “healing” the breaches of the two relationships. The emphasis was primarily, if not entirely, upon a restorative justice or healing approach as distinct from a retributive or punitive approach.⁷¹

⁶⁷ *R v C (LM)* (unreported, 1 September 1995, Alberta Youth Court, Jacobsen J).

⁶⁸ See *R v Manyfingers* (1996), 191 AR 342 at 358. See also Proulx, *op cit*, 67, who concludes that “Sentencing circles ... have a long history among some Aboriginal peoples in North America, including the Peigan (Blackfoot), Cree, Ojibwa and Maliseet peoples”.

⁶⁹ Author interview with Judge Bria Huculak, Provincial Court of Saskatchewan, Saskatoon, 9 June 1998. Judge Huculak also expressed the view that “sentencing circles cannot be separated meaningfully from the desire on the part of First Nations [for self-determination],” and has elsewhere observed that “The involvement of the community [via sentencing circles] validates aboriginal community values with the current [criminal justice] system: Bria Huculak, “From the power to punish to the power to heal”, *Justice as Healing* (Fall 1995) 1 at 3.

⁷⁰ Author interview with Judge Linton Smith, Provincial Court of Saskatchewan, Regina, 10 June 1998.

⁷¹ *Morin*, *op cit*, 67.

Similarly, in *R v Rich (No 1)*⁷² O'Regan J in the Newfoundland Supreme Court observed that "The concept of 'sentencing circles' is new and innovative for the courts. The concept, however, has been traditionally used by Aboriginal and Native people throughout the country."⁷³

For Judge Barry Stuart sentencing circles are best seen as a 'hybrid' born of co-operation between Aboriginal and non-Aboriginal legal cultures:

The partnerships formed with Yukon Community Peacemaking and Sentencing Circles draw heavily upon Aboriginal concepts of peacemaking and the practices typically found in mediation and consensus-building processes. Community Circles are neither wholly western, nor Aboriginal, but combine principles and practices from both in creating a community-based process to respond to conflict in a manner that advances the well-being of individuals, families and the community.⁷⁴

Ultimately attempts to 'locate' sentencing circles within or without 'traditional' Aboriginal cultures miss the point. A much more relevant and constructive line of inquiry is to explore the nature and extent of the embrace and ownership of this (and other) alternative justice processes by contemporary First Nation communities. From this point of view, comments such as the following, from Harold Gatensby of the Carcross Tagish First Nation, are telling: "This sentencing circle is our people's way."⁷⁵ Such comments confirm that the appropriate questions as to the relationship between circle sentencing and Aboriginal cultures should be about acceptance and compatibility rather than authenticity.⁷⁶

On the question of compatibility, one of the points which has been made on numerous occasions is that circle sentencing places a greater emphasis on restorative justice rather than the retributivist approach of conventional sentencing, and that this

⁷² *R v Rich (No 1)*, [1994] 4 CNLR 167.

⁷³ Ibid, 170.

⁷⁴ Stuart (1997), op cit, 4. Judge Heino Lilles, also of the Yukon Territorial Court, has similarly emphasised the importance of judge-community *partnership*: author interview with Judge Heino Lilles, Territorial Court of Yukon, Whitehorse, 25 May 1998. See also *Nicholas*, op cit, para 27 per Desjardins J.

⁷⁵ Gatensby in Nicholson, op cit, 16.

⁷⁶ The importance of the distinction is illustrated in the observation by Alphonse Janvier that "The concept of the sentencing circle in the existing justice system will never replace the traditional Métis/Indian circle of resolving conflict, and I will argue that to the last day; however, I strongly support the concept of the sentencing circle being used in the justice system ... It gives the community the opportunity to have a say in what healing takes place and how the healing should be done": Alphonse Janvier, "Sentencing Circles" in Richard Gosse, James Youngblood Henderson and Roger Carter (eds), *Continuing Poundmaker & Riel's Quest: Presentations Made at a Conference on Aboriginal Peoples and Justice* (Saskatoon: Purich Publishing and the College of Law, University of Saskatchewan, 1994) 301 at 301-302.

emphasis is characteristic of Aboriginal conceptions of justice.⁷⁷ As Fafard J observed in *R v Joseyounen*:

The aim of sentencing circles is the same as it is when the disposition is arrived at by other means: the protection of society by curtailing the commission of the crime by the offenders and others. However, in sentencing circles the emphasis is less on deterrence and more on re-integration into society, rehabilitation, and a restoration of harmony within the community.⁷⁸

Fafard J observed that such an approach to dispute resolution and sanctioning of anti-social behaviour was more compatible with Aboriginal conceptions of justice and traditional methods of dispute resolution.⁷⁹

It is important to recognise, however, that not all so-called ‘restorative justice’ approaches are necessarily applicable to a particular First Nation community merely because they are considered to have their origins in an Indigenous culture. The recent case of *R v McKay*⁸⁰ provides a good illustration of the dangers of over-generalisation, homogenisation and essentialisation in the context of reforms aimed at the incorporation of Aboriginal peoples’ values and processes into the criminal justice system.

In the reported judgement in *McKay* Reilly J, in the Alberta Provincial Court observed, in a way reminiscent of many judges who have become involved in Aboriginal community justice that based on a realisation that “justice will work better for the aboriginal when they participate in the process” the judge decided to “encourage the use of Aboriginal Sentencing Circles”.⁸¹ However, rather than engage in the discussions with community representatives which have commonly preceded the implementation of circle sentencing in other locations, to this end, Reilly J attended a presentation on Family Group Conferencing by John McDonald and David Moore of Transformative Justice Australia⁸² and arranged for training to be conducted in the First Nation communities where he sat as a circuit court judge. In *McKay* Reilly J observed that while the case itself was unremarkable, “[t]he manner in which the accused is being sentenced is remarkable because it is the first time in this jurisdiction that I have used the process known as Family Group Conferencing.”⁸³

⁷⁷ See, eg, AJIM, op cit, ch 2.

⁷⁸ *Joseyounen*, op cit, 189.

⁷⁹ Ibid.

⁸⁰ *R v McKay*, [1997] 7 WWR 496 (Alberta Provincial Court).

⁸¹ Ibid, 497.

⁸² In 1996 the RCMP and the Canadian Justice Department retained Transformative Justice Australia to consult on the establishment of Family Group Conferencing in Canada.

⁸³ *McKay*, op cit, 497.

Undoubtedly, there may be merit in Canadian ‘borrowing’ from Antipodean law reform initiatives and proposals (and vice versa). However, there is something curious and troubling about the story of a judge who, convinced of the value of First Nation community participation in justice administration on the Cochrane Reserve, Alberta (in the form of circle sentencing) adopted in pursuit of this objective a set of principles and processes (namely, ‘Family Group Conferencing’ (FGC)) developed by two non-Aboriginal Australian academics/entrepreneurs, and purportedly based on the traditional justice methods of the Maori of Aoteroa/New Zealand. Reilly J claims “that in trying to make better justice for the aboriginal, I have learned something from the aboriginal that may improve justice for all.”⁸⁴ However, the adoption of the FGC model for implementation in a First Nation community in Alberta appears to have been based on what Cunneen has described in the Australian context as

the spurious assumption that there are homologous social structures among Indigenous cultures. In other words, Indigenous people all over the world are seen as the same. Family group conferencing grew out of Maori traditions; Maori people are Indigenous; therefore all Indigenous people will benefit from family group conferencing. Ultimately such a view is racist, ascribing as it does some essentialist core to what it is to be authentically ‘Indigenous’ without cultural, spatial or temporal difference.⁸⁵

A number of commentators have expressed similar concerns with respect to the adoption of Family Group Conferencing in Canada. For example, Juan Tauri has expressed concern

that the imported family group conferencing forum (from New Zealand) is being forced upon Canadian First Nations at the expense of their own, and more appropriate, justice mechanisms ... Neither Federal nor Provincial governments in Canada should imagine that just because family group conferencing is *supposedly* based on indigenous (i.e., Maori) justice processes, that it is therefore appropriate for indigenes residing in their borders.⁸⁶

Gloria Lee has observed:

⁸⁴ Ibid.

⁸⁵ Chris Cunneen, “Community Conferencing and the Fiction of Indigenous Control” (1997) 30(3) *The Australian and New Zealand Journal of Criminology* 292 at 300. See also Harry Blagg, “A Just Measure of Shame?: Aboriginal Youth and Conferencing in Australia” (1997) 37(4) *British Journal of Criminology* 481.

⁸⁶ Juan Tauri, “Family Group Conferencing: The Myth of Indigenous Empowerment in New Zealand” (1999) 4(1) *Justice as Healing* 1. See also Juan Tauri, “Family Group Conferencing: A Case Study of the Indigenisation of New Zealand’s Justice System” (1998) 10(2) *Current Issues in Criminal Justice* 168.

With all due respect to the Maori people who have generously shared their knowledge and teachings with the government of their land in the hopes of benefiting the Maori youth—and with kind thanks to the government of Canada and the justice departments for their thoughtfulness—the First Nations people of North America, since time immemorial, have had and still do have principles and processes in place to deal with disharmony within the community much in the same way the Maori of New Zealand have. I am not sure whom that surprises, but it needs to be pointed out.⁸⁷

Of course, it is importance to recognise that particular First Nation communities in Canada may choose to adopt the FGC model or some other form of community-based or restorative justice not obviously or directly sourced in their own traditional culture. To suggest that such a choice was improper would be inconsistent with a recognition of the crucial need for Aboriginal self-determination in the area of justice administration. However, if FGC is promoted as the ‘preferred’ model of restorative justice—with implications for the availability of government funding and judicial support—then there is a danger of foreclosing the option of utilising traditional justice mechanisms, which may or may not resemble the FGC process.⁸⁸

In addition to a focus on restoration rather than retribution, one of the major points of departure between conventional approaches to sentencing in the Canadian justice system and circle sentencing is that the latter process is predicated on meaningful community participation in, and responsibility for, the process and the outcome. In *R v Webb*,⁸⁹ in which the first sentencing circle was conducted at the Kwanlin Dun First Nation in Whitehorse, Stuart J observed that

While sentencing circles in each community are significantly different in many respects, common to all circles is the opportunity for the community to participate and assume responsibility. The circle setting continues to forge new partnerships between the justice

⁸⁷ Gloria Lee, “The Newest Old Gem: Family Group Conferencing” (1997) 2(2) *Justice as Healing* 1.

⁸⁸ It is also important to recognise that from the point of view of influencing the locus of decision-making authority, the processes of family group conferencing cannot be assumed to be identical to those of circle sentencing. In *McKay* the sentenced arrived at by Reilly J was based on the agreement reached through the Family Group Conference. Reilly J observed that “I cannot delegate my sentencing function, but ... [i]t is my intention, in cases where it is appropriate, to suggest a Family Group Conference and if it is held to make the fulfillment of any agreement reached therein a term of the sentence”: *McKay*, op cit, 499. In terms of its relationship to the ultimate sentencing decision family group conferencing appears to more closely resemble a healing circle rather than a sentencing circle, in the terms on which these two processes were distinguished in *R v Sellon* (1996) 140 Nfld & PEI R 313 (Newfoundland Supreme Court) (discussed further below). See also LaPrairie (1997), op cit.

⁸⁹ *R v Webb*, [1993] 1 CNLR 148 (Yukon Territorial Court).

system and the community, and provides a positive working environment for developing a common desire to explore new avenues for sharing responsibility.⁹⁰

In light of this objective it is important to see the procedure of circle sentencing in broader terms than simply the meeting ‘without desks and tables’ which is substituted for a conventional sentencing hearing. While this is the defining ‘event’ of circle sentencing, its effectiveness depends heavily on preparation and follow-up. Many First Nation communities have now established justice committees which are responsible for overseeing the circle sentencing process from the screening and preparation of offenders seeking to have their cases determined in a sentencing circle, through facilitation of the main sentencing circle meeting (or series of meetings), including appointment of the ‘Keeper of the Circle’, up to the implementation of the sentencing plan agreed to by the circle and approved by the judge.

That circle sentencing constitutes more than just a one-off meeting in the space usually filled by the sentencing hearing is well illustrated by the case of *R v Lucas*.⁹¹ In this case the Court was not advised until the commencement of the scheduled hearing that the accused wanted to have his sentence determined in a sentencing circle. The Crown did not support the holding of a circle, and so what followed was, in the words of Hudson J, “not a sentencing circle in the cultural sense that has been adopted in other courts”.⁹² Instead, the judge organised the sentencing hearing as follows:

All persons who were present and were thought to be importance by the accused and his counsel were heard. They were sworn at once and sat as a group and shared each other’s company while testifying. Each was able to defer to another in answering the questions.⁹³

Hudson J explained that sentencing circles “are achieved by some preparation and the agreement of the prosecuting authorities, which was not the case here.”⁹⁴

Given that one of the primary motivations for the initiation of circle sentencing was that it would be beneficial to involve the community in the decision-

⁹⁰ Ibid, 153.

⁹¹ *R v Lucas*, [1994] YJ No 107 (QL) (Yukon Territorial Court).

⁹² Ibid, para 2.

⁹³ Ibid, para 1.

⁹⁴ Ibid, para 2. Hudson J continued, “However, though no circle resulted, there was certainly relaxation of the traditional way, and ... I hope that the fullness of the presentation by the witnesses has achieved the satisfaction of the community in expressing their interests and concern”: *ibid*, para 2. Interestingly, even though the case did not involve a full sentencing circle, the disposition clearly reflected the principles of community-based and culturally appropriate sentencing. Hudson J sentenced the offender to three months imprisonment and two years probation. The primary probation condition was that the offender was, ‘banished’ from the town of Mayo (where the offence occurred) to a First Nation “bush settlement” called No-Gold where he would gain “the rehabilitative effects of required bush living, living the Indian way”: *ibid*, para 14.

making process, it is important to consider how the ‘community’ is defined, and by whom the community is represented (that is, who participates in the circle, or how the participants are selected).

On the question of how community is defined, Stuart J has emphasised that “A community is not a place, it is people.”⁹⁵ It follows that while the practice of circle sentencing has been primarily developed and used in First Nation reserve communities that are relatively distinct in geographic, social and cultural terms, circle sentencing need not be limited to such settings. For example, in *R v SEH*⁹⁶ the offender, an Aboriginal man living in Vancouver, requested circle sentencing. Stromberg-Stein J acknowledged that “The constitution of the circle posed a challenge insofar as defining a circle of peers within an urban setting.”⁹⁷ However, a circle was convened, “composed of dedicated leaders of the native community in the Lower Mainland representing many different interests and people from all walks of life.”⁹⁸ Similarly, in considering a request for a sentencing circle from an Aboriginal man living in Saskatoon, Grotsky J in the Saskatchewan Court of Queen’s Bench stated in *R v Cheekineew*⁹⁹ that in the context of determining the existence of an appropriate community for the purpose of circle sentencing, “the term ‘community’ ought to receive a wide and liberal construction as the term ‘community’ may be, and probably is, a term capable of different interpretations depending on the residence ... of the particular offender ...”¹⁰⁰

The *availability* of a community for the purpose of circle sentencing involves more than just being able to define the existence of a group, whether geographically or personally. Community capacity, willingness and preparedness to participate in criminal justice decision-making (and to oversee follow up) is a prerequisite for the success of community-based justice whether in the form of circle sentencing or otherwise. In its 1992 decision in *R v Brown*¹⁰¹ the Alberta Court of Appeal observed that

Whether changes in the justice system may be made in the future to accommodate the special needs of aboriginal communities, it is beyond the ability of a trial court or an appellate court

⁹⁵ Stuart (1997), op cit.

⁹⁶ *R v SEH*, [1993] BCJ No 2967 (QL) (British Columbia Provincial Court).

⁹⁷ Ibid, para 1.

⁹⁸ Ibid.

⁹⁹ *R v Cheekineew* (1993), 80 CCC (3d) 143.

¹⁰⁰ Ibid, para 25. Note that Grotsky J denied the request for a circle partly on the basis that he was not convinced that the offender had access to a community in Saskatoon for the purpose. See also *R v Morin*, op cit, which was the first sentencing circle in Saskatchewan to be held in an urban centre (Saskatoon). In *R v Alaku* (1993), 112 DLR (4d) 732 at 742 Dutil J in the Court of Québec expressed reservations about whether the process of “consultation circles” which he had begun to employ in small Inuit communities in northern Québec would be appropriate in larger towns or cities.

¹⁰¹ *R v Brown* (1992), 13 CR (4th) 346.

to consider some modification of sentencing principles in a particular case unless there is evidence before the court that the accused's community is ready, willing and able to undertake some process which will enhance the possibility of rehabilitation and set an example which will deter other members of the community from similar conduct.¹⁰²

Similarly, Bayda CJ noted in *R v Morin* that the “capacity of each of these participants [offender, victim and community] to participate in a way that is likely to result in a restoration or healing” is important.¹⁰³ In *R v Cheekinew* Grotsky J specifically identified “the nature of an offender's community, and its willingness to participate in the sentencing process” as “factors which ... will ... be relevant to the determination of whether a sentencing circle ought to be established.”¹⁰⁴

In terms of which members of the community are represented on the sentencing circle the basic principle is that everyone is eligible and welcome to attend, and that the community takes primary responsibility for ensuring that there is appropriate representation amongst the participation. Commonly the community's justice committee will facilitate this process. In addition a number of judges have required evidence that the circle is representative and not ‘partisan’ before approving the holding of a sentencing circle. In *R v Naappaluk*¹⁰⁵ Dutil J expressed the view that circles

must always be made up of people who take a great deal of interest in the welfare of the community. These people must also be representative of the community itself, to whose opinion they give voice. Traditionally, Elders made important decisions. There should always be a place for them at those sittings. The victim should also be heard.¹⁰⁶

In *R v Joseyounen*, Fafard J identified as one of the criterion for the holding of a sentencing circle that “There are elders or respected non-political community leaders willing to participate”.¹⁰⁷ In *R v Alaku* Dutil J bluntly expressed another of the concerns that has prompted judicial oversight of the composition of circles: “It must be clear that the circle members are not individuals in the pay of any accused attempting to fool the court with regard to his sincerity.”¹⁰⁸

¹⁰² Ibid, 356-57.

¹⁰³ *Morin*, op cit, 67.

¹⁰⁴ *Cheekinew*, op cit, para 15.

¹⁰⁵ *R v Naappaluk*, [1994] 2 CNLR 143 (Court of Québec).

¹⁰⁶ Ibid, para 84.

¹⁰⁷ *Joseyounen*, op cit, 187. Having stipulated this requirement, Fafard J noted that “The many sentencing circles I have held included participation of chiefs, band councillors, mayors, and others in political office. I have never seen any of these persons attempt to influence the outcome by virtue of their political office.”

¹⁰⁸ *Alaku*, op cit, 742.

In the context of an examination of the extent to which circle sentencing represents a shift in the locus of decision-making authority in the criminal justice system, the spectre of judicial scrutiny of the composition of the circle is obviously significant. It raises the more general question of what rules have been established by the courts for the operation of circle sentencing, and what impact these rules have on the capacity of circle sentencing to achieve the goal of reconfiguring the decision-making process in a manner which allows for meaningful community participation. It is to an explanation and analysis of this matter that the next section of this article is directed.

5. JUDICIAL RULES FOR THE CONDUCT OF CIRCLE SENTENCING

In the previous section it was noted that the implementation of circle sentencing as a component of the Canadian criminal justice system has been motivated, at least in part, by a genuine recognition of the legitimacy, relevance and value of Aboriginal law and justice processes, cultural values and perspectives (including the authority of Aboriginal Elders). Yet, it is important to realise that this gesture of recognition and accommodation takes place within substantial constraints established by the mainstream justice system. The most obvious limitations are that the community does not participate in the determination of guilt or innocence, but only in the choice of sentence once guilt is established, and that the judge rather than the First Nation community is formally responsible for the ultimate decision as to sentence. Bazemore and Griffiths have observed that “courts and other agencies in Canadian communities experimenting with circle sentencing have experienced ongoing tension over the extent to which power sharing with the community should be limited”¹⁰⁹

This section of the article review the rules, guidelines and criteria which have been developed by judges involved in the initiation of circle sentencing in their respective jurisdictions. While a number of the cases discussed come from the Yukon and Saskatchewan, cases from other jurisdictions will also be discussed, so as to obtain a fuller picture of the way in which circle sentencing has been ‘shaped’ by judicial oversight across the country, to illustrate divergent approaches, and because there is, as in many areas of laws, considerable cross-jurisdictional ‘borrowing’ when it comes to rules for circle sentencing.

While the focus of this section is on the role of judges in setting the limits of circle sentencing it is important to recognise that the process of rule-setting is not an entirely unilateral process. It is important not to overstate the degree to which judges

¹⁰⁹ Bazemore and Griffiths, op cit.

alone determine the eligibility and procedural rules for circle sentencing. To do so would be to risk misconceiving the co-operative and collaborative nature of the exercise. First Nation communities have played an important role in ‘creating’ the practice of circle sentencing in terms suitable to their particular community. More specifically, community representatives (commonly in the form of a justice committee) frequently play a key role in determining which sorts of cases will be dealt with by way of circle sentencing, and whether a circle sentencing hearing is appropriate in a given case. For example, in *R v Johnstone*¹¹⁰ the defendant requested that he be sentenced by sentencing circle on a number of charges of which the most serious was possession of narcotics for the purpose of possession under s 4(2) of the *Narcotics Control Act*. Lilles J observed that “initially, the [Kwanlin Dun] Justice Committee did not accept Mr Johnstone for a sentencing circle, because he was a not a long-time member of that community and because they felt uncomfortable dealing with a drug offence.”¹¹¹ However, the defendant regularly attended meetings of the Justice Committee over an eight month period prior to sentencing and at his sentencing hearing a number of people from the Justice Committee and the community spoke or made submissions on his behalf.

More generally, justice committees have participated in the development of guidelines and establishing processes for making decisions about eligibility. For example, the Justice Committee of the Kwanlin Dun First Nation has explained their process in the following way:

Kwanlin Dun Circle Court deals primarily with sentencing where a guilty plea has been entered. Offenders wishing their cases heard in the Circle are now required to complete an Application and develop an action plan (with the assistance of a support worker), which is reviewed by the Justice Committee.

When the offender meets with the Justice Committee, they will be encouraged to provide information about where they are on their healing path. They are also encouraged to bring people in the community who are willing to support them and who believe they are motivated to make changes in their life.

The victim will be contacted to discuss the crime, any support or resources they need, how they feel about the offender applying for circle sentencing, and whether they would like to be part of the process. This information is discussed with the Justice Steering Committee.

¹¹⁰ *R v Johnstone*, [1996] YJ No 13 (QL) (Yukon Territorial Court).

¹¹¹ *Ibid*, para 38.

Based on the information provided by the offender (particularly what steps they have taken on their action plan), their support worker, and the victim, the Justice Committee Steering Committee and Elders will make a decision about approving the application.¹¹²

In some cases, formal protocols have been developed between First Nation communities and justice departments, specifically to achieve greater clarity as to when Crown prosecutors would be prepared to support the holding of a sentencing circle. An example is the Protocol of the Katapamisuak Society at the Poundmaker Cree Nation in Saskatchewan.¹¹³ Whether in the form of guidelines by First Nation justice committees or as protocols between First Nation communities and relevant government departments, these rules are not developed independently of the rules developed by judges,¹¹⁴ so that an understanding of the latter remains crucial to a valid analysis of the operation of circle sentencing.

Roberts and LaPrairie have observed that “judicial discretion is critical at two stages of the process: at the beginning, when the judge agrees to conduct the circle and, at the conclusion, when the judge accepts, rejects or modifies the recommendation of the circle.”¹¹⁵ The current section will consider the rules that judges have developed to guide the exercise of their discretion at both points.

5.1 Eligibility for Circle Sentencing

One of the first reported cases to attempt to expressly state criteria for the use of sentencing circles was *R v Cheekinew* in the Saskatchewan Court of Queen’s Bench. In *Cheekinew* the starting point adopted by Grotsky J was that “not every convicted person is entitled *ipso facto* to an order for the creation of a sentencing circle.”¹¹⁶ In addition to consideration of the “nature of the offender’s community” (discussed earlier), Grotsky J held that eligibility for a prison sentence of less than two years (and therefore eligibility for a probation order) was a pre-condition for the establishment of a sentencing circle.¹¹⁷ In addition Grotsky J ruled that he was

¹¹² Kwanlin Dun Justice Committee, *Kwanlin Dun Community Justice: Circle Sentencing*, quoted in *Gingell*, op cit.

¹¹³ See Green, op cit, 78.

¹¹⁴ For example, Green has noted that The Protocol of the Katapamisuak Society “incorporated the criteria later set out by Judge Fafard in *Joseyounen*”: *ibid*. See also *Gingell*, op cit, where Lilles J noted, after having quoted extensively from the Kwanlin Dun Justice Committee’s guidelines on circle sentencing that “The Court’s own procedures supplement, and where there is conflict, override the community guidelines.” Note, however, that Lilles J was referring to procedures for the operation of sentencing circles rather than eligibility criteria for the holding of a sentencing circle. On the latter, Lilles J has opposed the judicial imposition of rigid guidelines (see below).

¹¹⁵ Roberts & LaPrairie, op cit, 72. See *Morin*, op cit, 47-48 per Sherstobitoff JA (Tallis and Cameron JJA concurring). A third ‘site’ of relevant judicial discretion – the oversight of appellate courts – is discussed in McNamara, op cit.

¹¹⁶ *Cheekinew*, op cit, 174.

¹¹⁷ *Ibid*, para 16, 21. There is considerable judicial disagreement on this two year jail term question. It is an important issue which goes to the heart of the purpose of circle sentencing and the significance of

not ... satisfied that the offender is genuinely interested in any help from his Saskatoon community ... In my view he sees what is now proposed on his behalf as merely a means of attempting to avoid that which is now justly due to him. As well, I am not satisfied, even if given the opportunity so to do, that if he has a “community” in Saskatoon, that his community will be able, even if willing to do so, as was the situation in the Moses case, to properly control and supervise him.¹¹⁸

In summary, Grotsky J proposed the following non-exhaustive list of eligibility criteria for the holding of a sentencing circle:

- a) If the trial judge is ... of the view that the offender must receive a punitive term of imprisonment of two years or more, then ... a submission should not ... be heard for the establishment of a sentencing or like circle.
- b) [The offender should be] genuinely contrite ...
- c) [The offender should be] supported in the request for the establishment of a sentencing circle by the offender’s own community willing to participate in the sentencing circle process and to make meaningful sentencing recommendations ... [and] to assume responsibility for the supervision and enforcement of the terms of the probation order including the reporting of any breach ...
- d) [The offender should be] a person honestly interested in turning his or her life around with the assistance and supervision of his or her ‘community’.¹¹⁹

In *R v Alaku* Dutil J identified what he considered to be (and what have become widely regarded as) two essential criteria in deciding whether a sentencing circle should be held in a given case. First, “[t]he accused must have the firm and clear intention to rehabilitate himself and become a good citizen.”¹²⁰ Second, there must be sufficient desire on the part of the community “to become involved for the sake of one of its members.”¹²¹ In addition Dutil J identified a number of relevant “factors” that the court should consider. For example, was the crime one of serious violence or sexual assault?¹²² If so circle sentencing would generally be inappropriate.

the shift in decision-making authority which circle sentencing may be considered to represent (discussed further below).

¹¹⁸ Ibid, para 24.

¹¹⁹ Ibid, para 25. On the fourth criterion, see also *Naappaluk*, op cit, para 78 where Dutil J expressed a similar view: “It seems entirely useless to form a circle if the accused deliberately refuses to mend his ways and does not commit himself in advance to follow in all sincerity the [sentencing circle] recommendations approved by the judge.”

¹²⁰ *Alaku*, op cit, 735.

¹²¹ Ibid, 736.

¹²² Ibid, 739.

Did the offender plead guilty or was he found guilty by trial?¹²³ Dutil J considered that while this was a relevant consideration (i.e. denial by the offender would not usually be compatible with the sentiments necessary for the holding of a circle) a guilty plea should not be treated in all cases as a pre-condition to eligibility for circle sentencing. Is the victim prepared to participate in the circle?¹²⁴ While Dutil J considered victim participation in the circle to be highly desirable he did not appear to consider it essential, and stressed that the victim should not be pressured into participating.¹²⁵ Are the community participants in the circle capable of playing the role that is required of them, and there for the purpose of representing the community rather than simply as partial advocates for the offender?¹²⁶

In *R v Rich (No 1)* O'Regan J in the Newfoundland Supreme Court was asked to rule on the offender's application for a sentencing circle. The application was opposed by the Crown in light of "1. The nature of the offence; 2, the fact that the complainant does not wish to participate; and 3. The range of sentence."¹²⁷

O'Regan J quoted with apparent approval the criteria adopted by Grotsky J in *Cheekinew*, and added that in cases such as the one before him "the participation of the victim is an important consideration."¹²⁸ Indeed, for O'Regan J the non-participation of the victim was determinative:

Without the complainant a large slice of the circle is missing. I find that a sentencing circle certainly requires four integral parts:

1. the judge;
2. the accused;
3. the complainant (if there is one); and
4. the community.

Others may be added but these are the very foundation.¹²⁹

Of particular concern to O'Regan J was that a judge's participation in a circle which did not include the victim might compromise judicial independence by creating the appearance that the judge was favouring the offender's interests over those of the accused.¹³⁰ Having rejected the offender's application for a sentencing circle O'Regan

¹²³ Ibid, 740.

¹²⁴ Ibid, 740-41.

¹²⁵ Ibid, 741.

¹²⁶ Ibid, 741-42.

¹²⁷ *Rich (No 1)*, op cit, 169.

¹²⁸ Ibid, 171.

¹²⁹ Ibid, 172. See also *R v CJ* (1997), 119 CCC (3d) 444 (Newfoundland Court of Appeal) at 461 per Green JA (for the court).

¹³⁰ *Rich (No 1)*, op cit, 172.

J noted that he still wanted community input into the sentencing decision and proposed a number of ways to achieve this, including, “hearing the results of the consensus of the community from their own sentencing circle with the accused and without the complainant and the judge.”¹³¹

When the same matter returned to O’Regan J for sentencing,¹³² the judge took the opportunity to make some further comments about the factors relevant to a determination as to whether the court should approve a sentencing circle. In particular O’Regan J considered the relevance of the seriousness of the offence:

I find that “sentencing circles” will be most useful in minor offences. It is my view that only in very rare cases will a victim in a serious charge be willing to confront the accused in a “sentencing circle” ... I should add that in a serious charge where a complainant appears willing to participate in a sentencing circle the presiding judge should carefully inquire that the complainant is genuine in the desire to attend and is not in any way being pressured to do so by others. If it becomes obvious that the complainant is testifying at the request of others and not on his or her own behalf then the perception could be clearly left that the circle is for the benefit of the accused. The circle, like a judge, must clearly be independent and to be perceived otherwise is fatal to the sentencing process.¹³³

It is not entirely clear what O’Regan J intended by the requirement that circle be ‘independent’. Presumably, and reasonably, the expectation is that participants must not be biased in favour of the offender and against the victim. But independence may also be considered to connote a more general detachment or objectivity which is in many ways the antithesis of how circle sentencing is designed to operate as a mechanism of community justice. One of the advantages of circle sentencing (when compared with the conventional court process and circuit courts in particular) is that the participants *do* know and have ongoing relationships with the offender (and usually with the victim). Circle sentencing is predicated on valuing and utilising these connections in making an appropriate sentencing decision and in increasing the likelihood that the offender will successfully complete his/her sentence.

In *R v Joseyounen* Fafard J of the Provincial Court of Saskatchewan and one of the judicial pioneers of the use of sentencing circles in the north of the province stressed the importance of criteria: “In deciding whether or not to hold a sentencing circle the court is exercising a judicial function. That means that the decision must not

¹³¹ Ibid.

¹³² *R v Rich (No 2)*, [1994] 4 CNLR 174.

¹³³ Ibid, 175. See also *Naappaluk*, op cit, para 78 where Dutil J observed that “certain crimes –although I cannot specify which ones exactly – do not lend themselves to such exercises”.

be made arbitrarily, it must be made with reference to certain criteria.”¹³⁴ Fafard J explained that seven criteria had been adopted by judges of the Provincial Court of Saskatchewan in the north for “deciding if a case for sentencing should go to a circle.”¹³⁵ The criteria had been developed over a period of time, originally by “researching the materials and decisions coming out of the Yukon, particularly the decision of Judge Barry Stuart of the Yukon Territorial Court in *R v Moses*”, and since July 1992 when the first sentencing circle in the province was initiated by Fafard J, based on his experience and that of his judicial colleagues, and by community consultation,¹³⁶ as sentencing circles “came into existence in different northern communities.”¹³⁷

The seven criteria, as outlined by Fafard J in *Joseyounen* are:

1. The accused must agree to be referred to the sentencing circle.
2. The accused must have deep roots in the community in which the circle is held and from which the participants are drawn.
3. There are elders or respected non-political community leaders willing to participate.
4. The victim is willing to participate and has been subjected to no coercion or pressure in so agreeing.
5. The court should try to determine beforehand, as best it can, if the victim is subject to battered woman’s syndrome. If she is, then she should have counselling and be accompanied by a support team in the circle.
6. Disputed facts have been resolved in advance.
7. The case is one in which a court would be willing to take a calculated risk and depart from the usual range of sentencing.¹³⁸

Fafard J noted that “These criteria are not carved in stone, but they provide guidelines sufficiently simple for the lay public to understand, and are also capable of application so that our decisions are not being made arbitrarily.”¹³⁹ Fafard J indicated that a judge’s decision as to whether a request for a sentencing circle should be granted involves two steps. First, an application of the criteria to the facts of the case. Second, if the criteria are not satisfied, an inquiry as to whether “there [is] still good reason to hold a sentencing circle.”¹⁴⁰

¹³⁴ *Joseyounen*, op cit, 183.

¹³⁵ Ibid.

¹³⁶ Ibid.

¹³⁷ Ibid.

¹³⁸ Ibid, 185-88.

¹³⁹ Ibid, 183.

¹⁴⁰ Ibid.

In the case at hand Fafard J ruled that the seventh criterion was not satisfied—a penitentiary term was unavoidable—and therefore the application for a sentencing circle was refused. Instead Fafard J agreed to the holding of a “healing circle” which the family of the offender had requested “‘as a way of healing and insuring that something like this does not happen again’”.¹⁴¹ Fafard J indicated that he would not determine the length of the offender’s prison sentence until after the healing circle had met because his decision “may be impacted by the discussion in the circle.”¹⁴²

To date, appellate courts have declined to impose binding rules on lower courts, but have strongly recommended that clear eligibility criteria be established.¹⁴³ In *R v Johns* Prowse JA in the Yukon Territorial Court of Appeal discussed, with implicit approval, the criteria outlined by Fafard J in *Joseyounen*, and in *R v Morin*, the majority of the Saskatchewan Court of Appeal implicitly approved the *Joseyounen* criteria and those utilised by Grotsky J in *Cheekinew*. In addition, the Saskatchewan Court of Appeal endorsed the limitation that a sentencing circle should not be held unless the minimum sentence which could be handed down involved less than two years imprisonment.¹⁴⁴

In contrast, the Chief Justice of the Saskatchewan Court of Appeal has disapproved of fixed eligibility criteria, preferring, in *Morin*, to identify just “two mandatory criteria: ... the willingness of the offender and the existence and willingness of a community.”¹⁴⁵ Bayda CJ has elaborated on these two criteria by stating that a judge should not direct the holding of a sentencing circle unless/he is satisfied that:

1. There exists a community with the following attributes:

- (i) the community is reasonably well defined by reason of the racial origin of its members, their religion or culture or by geography or some other feature which distinguishes the community from other communities;

¹⁴¹ Ibid, 190.

¹⁴² Ibid. Fafard J also suggested that the circle could “make suggestion for parole conditions that the Parole Board would wish to consider if the accused makes an application for parole”: *ibid*.

¹⁴³ See *R v Johnson* (1994), 31 CR (4th) 262 (Yukon Court of Appeal) at 296 per McEachern CJ and at 278 per Cummin JA; *R v Johns*, [1996] 1 CNLR 172 (Yukon Court of Appeal) at 178 per Prowse JA (McEachern CJ and Goldie JA concurring); *Morin*, *op cit*, 47-48 per Sherstobitoff JA (Tallis and Cameron JJA concurring). For a more detailed discussion of the manner in which appellate courts have responded to circle sentencing, see McNamara, *op cit*.

¹⁴⁴ *Morin*, *op cit*, 47-48.

¹⁴⁵ Ibid, 69. In *R v Antoine*, [1997] OJ No 4078 (QL) (Ontario Court of Justice (Provincial Division)) the judge rejected the offenders’ request for a sentencing circle on an application of the “two mandatory criteria” endorsed by the Saskatchewan Court of Appeal in *Morin*. Fitzgerald J concluded, with respect to the case at hand that “there does not appear to be an offender willing to accept full responsibility for the wrongdoing, nor does it appear that there is an existing and willing community to assist in the restoration or healing as contemplated in *Morin* (para 33). The case involved numerous charges relating to hunting on Manitoulin Island by members of First Nation communities contrary to Ontario legislation (the *Game and Fish Act* and the *Trespass to Property Act*.)

- (ii) the community recognizes the accused not only as a member but as one who has the kind of relationship with the community that ought to make him or her feel accountable to it for any criminal wrongdoing;
- (iii) the community supports the accused in his or difficulty with the law and is prepared to accept the accused as a person who has the capacity, inclination, need and the sincerity to be restored (healed) in his or her relationship with the community and in his or her relationship with the victims of the wrongdoing;
- (iv) the community has sufficient healing or restorative resources to help the accused (and where necessary the other persons affected by the wrongdoing) in that restoration or healing.

2. The accused:

- (i) considers himself or herself a member of the community and as one who has the kind of relationship with it that makes him or her feel accountable to it for the wrongdoing;
- (ii) has the capacity, inclination, need and the sincerity to be restored (healed) in his or her relationship with the community and with the victims of the wrongdoing;
- (iii) has taken full responsibility for the wrongdoing;
- (iv) has pleaded guilty or in some other acceptable way has demonstrated the attributes described in (ii) and (iii);
- (v) is prepared to accept and carry out the decision of the community acting through its representatives at the sentencing circle respecting the measures the community deems appropriate for the restoration or healing.¹⁴⁶

According to Bayda CJ where these two pre-requisites are satisfied, the judge should not automatically approve an application for a sentencing circle, but should first “consider all of the other factors that bear upon the issue”,¹⁴⁷ including the seriousness of the offence and the victim’s willingness to participate. The Chief Justice did not support a two year imprisonment limit¹⁴⁸ and did not consider victim participation to be mandatory in all cases.¹⁴⁹ Significantly, Bayda CJ’s position on the two year limit was adopted by a majority of the Saskatchewan Court of Appeal in *R v Taylor*.¹⁵⁰

In *R v Manyfingers* Jacobsen J of the Alberta Provincial Court was prompted to consider at length the question of appropriate criteria and procedures for the use of circle sentencing because the sentence recommended by the sentencing circle represented “a departure from the sentencing guidelines for domestic violence

¹⁴⁶ *Morin*, op cit, 69-70.

¹⁴⁷ *Ibid*, 70.

¹⁴⁸ *Ibid* 73.

¹⁴⁹ *Ibid* 73-74.

¹⁵⁰ *R v Taylor* (1997), 122 CCC (3d) 376 at 399-400 per Bayda CJ.

established by the Alberta Court of Appeal.”¹⁵¹ The offender had pleaded guilty to a charge of aggravated assault (on her husband) under s 267(1)(a) of the Criminal Code. The offender was accepted into the Blood Indian Reserve’s Aisiimohki alternative sentencing program, the outcome of which was a recommendation for a non-custodial sentence. The Crown and defence counsel agreed with the recommendation.

Jacobsen J stated that “certain procedures, standards and guidelines must be established” in the interests of “uniformity of approach” (as opposed to “uniformity of sentence”).¹⁵² Taking as the starting point what were described as “[t]he criteria approved in *Johns*”¹⁵³ (as well, in the context of the facts of *Manyfingers*, the principles of sentencing in domestic violence stated by the Alberta Court of Appeal in *Brown*¹⁵⁴) Jacobsen J suggested a 15 point list of guidelines for the conduct of circle sentencing.

1. The sentencing circle can exist separately and independent of the judicial system if the participants so desire. And if so, the sentencing circle’s proper recommendations, if made in a timely fashion, can still be considered by the Court.
2. The application to the panel should be made as soon as possible after the offence has been committed, and time permitting, the sentencing circle process should be underway even before the first court appearance. This may allow for alternative measures pursuant to s 717 [of the Criminal Code]. In any event the factors outlined in s 717 are relevant to the sentencing circle process.
3. [There] must be a prompt plea of guilty, not only as a meaningful expression of remorse and for sparing the victim, but also, to promote expeditious justice. Such a plea clearly ensures “timeliness” in the traditional way to promote healing. This acceptance of responsibility is also necessary to determine, resolve and agree upon all relevant facts.
4. Both the victim and the community must also be willing and effective participants.
5. The principles and objectives of the sentencing circle should be well formulated, perhaps with a standard preamble for each report. This will assist all segments of society to better understand and appreciate the process. Although the sentencing principles and general objectives shouldn’t change, the specific objectives having regard to the actual circumstances of each case will vary.

¹⁵¹ *Manyfingers*, op cit, 345.

¹⁵² Ibid, 357.

¹⁵³ Ibid, 375.

¹⁵⁴ *Brown*, op cit.

6. The standards of the report must be extremely high to bring credit to, and enhance the integrity and reputation of the process and of the members of the sentencing circle, and to be seen as much by the public and by the accused.

7. The report should be prepared and submitted in a timely fashion. The format and certainly the information should be similar to that found in the standard Probation Pre-Disposition or Pre-Sentence Report but must go further to ensure that there is meaningful input from the offender's community to "ensure a more realistic evaluation of the offender's situation".

8. All participants in the sentencing circles should be fully identified by name, address, status, occupation and speciality or category role in the circle (eg mediator), specific expertise, and relationship, if any to the victim or accused. Aboriginal leaders must have adequate cultural awareness and appreciation ...

9. All participants should be made aware of the legal process, sentencing principles, and sentencing alternatives, in order to weigh and make knowledgeable decisions. They should consult with Crown counsel, but particularly with corrections and community supervision staff involved in sentencing matters who have expertise 'in identifying sentences that work'. ... Applicable historical aboriginal precedents, principles and background, if relevant, should be included.

10. Community assessment, including observation and reports on the conduct of the accused, should commence before the court confirms the use of the sentencing circle, form part of the discussion, be referred to in the report and continue to date of sentencing ...

11. [The report should] outline all of the factors considered, the cultural foundation; the pros and cons of each course open to the circle, the victim, the community and to the offender; the analysis; and finally, the recommendation based on unanimity. Alcohol and substance abuse factors must be considered in detail.

12. The report should be so comprehensive that rarely, if ever, will it be necessary that the mediator or case manager be called to give evidence. ...

13. Recommendations must have legal and cultural validity and must be realistic having regard to:

(a) available resources,

- (b) the nature and character of the offender,
- (c) the nature and needs of those most closely in contact with the offender, and
- (d) the concerns and needs of society.

14. The assessment and report must be completed promptly, but allow reasonable time, when appropriate, for the individual to attend and complete relevant assessment and initial counselling. They may require special applications for adjournments. It is preferable, however, that prompt disposition take priority. Completion of special programs are best imposed as conditions to be complied within a probation order or conditional sentence order.

15. Sentencing must not be delayed.¹⁵⁵

This is a detailed and onerous set of guidelines. In large part these attributes would appear to be a consequence of the particular model of circle sentencing in relation to which they have been formulated—a model under which there is considerable distance between the judge and the circle. In contrast to the models of circle sentencing which have developed in many Yukon and Saskatchewan communities, judicial participation is absent and direct judge/community co-operation with respect to the sentencing decision appears limited in the sentencing scheme for which Jacobsen J has produced guidelines. That is, Jacobsen J appears to have been concerned with regulating what is, in effect, a very different process than that which is commonly described as “circle sentencing” — at least as this term has commonly been employed with respect to the practices that have developed in the Yukon and Saskatchewan. Consequently the *Manyfingers* guidelines for sentencing circles are different in form and purpose from the guidelines developed in other cases (such as *Joseyounen*) which have primarily been concerned with the issue of eligibility—that is, which cases are suitable to be handled by way of sentencing circle.

Further evidence of an ‘independent’ model of circle sentencing, is found in the case of *R v H*,¹⁵⁶ also a decision of the Alberta Provincial Court. In *R v H* Marshall J declined to accept the non-custodial sentence recommendation of a Native Sentencing Circle which had been facilitated by the Edmonton Native Youth Justice Committee. While expressing appreciation for the Circle’s input (and shaping a post-release probation order which incorporated most of the Circle’s recommendations,¹⁵⁷) Marshall J concluded that the seriousness of the offence required a prison term. In addition to the demands of the facts of the case, Marshall J’s rejection of the Circle’s recommendation appears to have been prompted also by general unease about the lack

¹⁵⁵ *Manyfingers*, op cit, 375-77.

¹⁵⁶ *R v H* (1997), 205 AR 226.

¹⁵⁷ *Ibid*, 238.

of clear rules and guidelines for the operation of circle sentencing,¹⁵⁸ and a specific concern that in the case at hand the circle had demonstrated “minimal” concern for the nine-year old sexual assault victim.

Not only does *Manyfingers* impose onerous obligations on First Nation communities who wish to develop circle sentencing, but nowhere in Jacobsen J’s judgement is there any indication as to the status of the recommendations contained in a circle sentencing report. Clearly, it is anticipated that sentencing would take the recommendation into account in handing down sentence, but given the comprehensive nature of the guidelines for the conduct of sentencing circles, First Nation communities might reasonably expect some sort of assurance that sentencing circle recommendations that emerge from a process that complies with the 15 point checklist proposed in *Manyfingers* will not lightly be ignored by sentencing judges. Such an assurance might be considered to be implicit in the manner in which the judge has presented the guidelines, but an express assurance (qualified, if deemed necessary by the customary reminder that the ultimate decision-making authority remains with the judge) would have gone some way towards dispelling the impression left by Jacobsen J’s judgement in *Manyfingers* of a significant degree of ambivalence and scepticism about the benefits, integrity and practicality of circle sentencing.¹⁵⁹

While sentencing circles of the sort utilised in *Manyfingers* and *HR* would appear to enjoy greater independence and autonomy from the conventional court system, in effect, the converse may be true. The primary themes of the guidelines developed by Jacobsen CJ in *Manyfingers* are accountability and efficiency, which in turn reflect a degree of underlying scepticism about what is actually going on in circle sentencing processes. These themes are perhaps most obviously reflected in Jacobsen J’s stringent requirements as to the contents of the written report to be produced by the circle. The perceived need for stringent guidelines arises, it would seem, in large part because of the judge’s non-participation in the process.¹⁶⁰ Therefore, the level of judicial oversight may be greater, and the weight afforded to circle recommendations (representing, effectively, a community-based pre-sentence report) may be less where the sentencing circle operates at a distance from the judge and the sentencing court.

Of course, consistent with their right to self-determination First Nation communities are entitled to choose the method of participation in the sentencing process that it is appropriate and acceptable to the community. The adoption of an independent and ‘at arms length’ model of circle sentencing may reflect such a choice.

¹⁵⁸ Ibid, 236-37.

¹⁵⁹ It should be noted that in the case at hand in *Manyfingers* Jacobsen J did ultimately hand down a non-custodial sentence. The offender was sentenced to a conditional sentence (ie to be served in the community) of 12 months and two years probation.

¹⁶⁰ For a useful illustration of the value of judicial participation in the circle sentencing process, see *R v Charleboy*, [1993] BCJ No 2854 (QL) (British Columbia Provincial Court).

But from the point of view of this article's primary concern—whether circle sentencing represents a significant shift in the locus of decision-making authority in the criminal justice system—such forms of community participation need to be distinguished from the community/judge/court co-operative process which the term circle sentencing is commonly used to denote.

The case of *R v Sellon*¹⁶¹ from the Newfoundland Supreme Court provides a good illustration of the distinction. The offender was a non-Aboriginal man who was raised and lived in the Innu community of Sheshashit, Labrador. In O'Regan J's judgement, the offender was described as someone who "from an early age ... developed a close relationship with the Innu culture and people which still exists today."¹⁶² The offender pleaded guilty to a charge of sexual assault on a 13 year old girl. Initially the offender applied to be sentenced by sentencing circle. The Crown opposed this application and subsequently the application was withdrawn. As an alternative, the offender participated in what the judge subsequently described as "an informal 'healing circle' outside the courtroom setting and in the community of Sheshashit."¹⁶³ When advised of the offender's plan to pursue this option O'Regan J

... indicated to both counsel that if they wished to attend the 'healing circle' they could do so and I would place what I deem to be the appropriate weight to the results of the 'healing circle' after I had received the results.¹⁶⁴

A report of the healing circle prepared by two of the participants was submitted to O'Regan J. The report note that this was the first time that the proceedings of a healing circle in Sheshashit had been reported to a judge to be taken into account in determining a sentence.¹⁶⁵ On the distinction between a sentencing circle and a healing circle the report contains the following statement:

We ... made a deliberate decision that it was not suitable or accurate to call this planned circle a 'sentencing' circle. Sentencing is a justice system process to be done in court by court participants and the judge. This circle would be held as a circle of concern and support for [the victim and the offender]. Included in the circle as part of the process would be

¹⁶¹ *Sellon*, op cit.

¹⁶² Ibid, 314. The Crown raised concerns about whether a non-Aboriginal person should 'benefit' from restorative approaches to justice like sentencing/healing circles, but O'Regan J considered this to be a "nonissue": 316. In *R v Paul*, [1999] 1 CNLR 149, Jackson J in the New Brunswick Provincial Court considered whether a circle would be appropriate in light of the fact that although the assault occurred on an Aboriginal reserve (the Woodstock First Nation) the *victim* was not a member of the Aboriginal community. Jackson J held that this was not a barrier to the approval of a sentencing circle: para 4-5.

¹⁶³ *Sellon*, op cit, 314.

¹⁶⁴ Ibid.

¹⁶⁵ The report is appended to O'Regan J's judgement: *ibid*, 317-24.

recommendations made by the participants which would be shared with the courts to be used by the Judge as he saw fit.¹⁶⁶

O'Regan J accepted the recommendation of the healing circle and handed down a non-custodial sentence.¹⁶⁷

In contrast to the comprehensive guidelines recommended by Jacobsen J in *Manyfingers*, a number of judges directly involved in circle sentencing have questioned the need for, or appropriateness of, rigid 'guidelines'. For example, in *R v Nicholas* Desjardins J of the New Brunswick Provincial Court stated:

... I will not set out any criteria or guidelines for accepting or rejecting an application. Each case is different and each case must be looked at individually. I will, however, suggest that there are three integral elements to the composition of the sentencing circle: the judge, the accused and the community.¹⁶⁸

In *R v CP*¹⁶⁹ Lilles J observed that criteria of the type adopted by Fafard J in *Joseyounen* may be appropriate "where the purpose of the circle sentencing hearing is to develop an alternative sentence".¹⁷⁰ However:

Sometimes, but not always, a circle sentencing hearing results in the development of a community based alternative sentence. In other instances, it results in a disposition which involves incarceration within a range that could have been expected in ordinary court.¹⁷¹

Lilles J observed that in calling for guidelines and criteria in all circle sentencing cases, Courts of Appeal, including the Saskatchewan Court of Appeal in *R v Morin*, have failed to "distinguish between the procedural aspects of holding a circle sentencing hearing, and the imposition of an alternative sentence."¹⁷² Lilles J argues that while strict guidelines might be appropriate in cases where the charges are very serious and the purpose of the circle is to determine an alternative sentence, the same criteria may not be appropriate where the purpose and effect of the circle is to facilitate community participation in the decision-making process. In such cases, Lilles J has elsewhere stated (in the case of *Gingell*) that the court's basic eligibility

¹⁶⁶ Ibid, 318.

¹⁶⁷ Ibid, 317.

¹⁶⁸ *Nicholas*, op cit, para 17.

¹⁶⁹ *R v CP*, [1995] YJ No 186 (QL) (Yukon Territorial Court).

¹⁷⁰ Ibid, para 5.

¹⁷¹ Ibid, para 2.

¹⁷² Ibid.

requirements should be that the offender must: “fully accept responsibility” for his/her crime; have “significant support from the community, friends, or family”; and fulfil the requirements of the application process as prescribed by his/her community’s justice committee.¹⁷³ Stuart J, also of the Yukon Territorial Court, has similarly resisted the pressure for judicial imposition of strict eligibility criteria, preferring to see this task as a community responsibility.¹⁷⁴ According to Stuart J:

Communities do not reject cases on the basis of the crime committed. Minor offences such as drinking underage to serious, indictable offences including manslaughter and sexual assaults have been heard in Circle Sentencing. The connection of the offender to the community, the sincerity and nature of offender’s efforts to be healed, the input of victims and the dedication of the offender’s support group primarily determine whether the case will be accepted into the Circle.¹⁷⁵

Underlying Lilles J’s criticism in *CP* of appellate court calls for firm criteria appears to be a consciousness of a common misconception about the purpose of sentencing circles—that they are designed to result in alternative sentences and avoid incarceration.¹⁷⁶ While overwhelming evidence of the high levels of Aboriginal over-representation in prisons and concern about the limited value and impact of incarceration were important motivations for the initiation of the practice of circle sentencing, alternative sentencing is not the *raison d’être* of circle sentencing (or as Fafard J expressed the same point in *R v Joseyounen*: “keeping people out of jail is not the aim of this exercise. If that were the only goal, one need only open the jails and release all Aboriginal inmates immediately”¹⁷⁷).

Avoiding incarceration may be a desirable outcome of a sentencing circle in a particular case but it is not necessarily the primary purpose for the use of the circle. One of the most important benefits of circle sentencing is that, irrespective of what sentence is handed down at the end of the day, to a considerable extent the offender is sentenced by his/her community. As Lilles J noted in *CP*, one of the advantages of circle sentencing is that

Offender participation is increased and the impact of the sentencing hearing will be more meaningful to him or her. It is one thing to be “condemned” by a faceless judge, quite another to be told by members of one’s family and friends that certain conduct is unacceptable and

¹⁷³ *Gingell*, op cit. See also Stuart (1997), op cit, 32-38.

¹⁷⁴ See “Circles” (NFB, 1997).

¹⁷⁵ Stuart (1996), op cit, 298.

¹⁷⁶ See also Quigley, op cit, 290.

¹⁷⁷ *Joseyounen*, op cit, 189.

will not be tolerated. As Judge Stuart stated in *Moses*: “Punishment, if required, can be imposed in a circle as readily as in a courtroom. There is a significantly different sting to a punishment imposed by a community, than to a similar sentence imposed by a circuit court judge. Punished by a community, the offender must face his sentence daily.”¹⁷⁸

In *R v CP* the offender was sentenced to nine months imprisonment (in addition to two months of pre-trial custody) and two years probation for a conviction of assault causing bodily harm under s 267(1)(b) of the Criminal Code. CP had proposed as an alternative to a prison term, a sentencing plan which would included a curfew, abstention from alcohol, 300 hours of community service and a long probation period. However, it appears that this plan did not attract wide support in the circle. Lilles J stated that “After hearing everyone who spoke on this matter and the concerns that were expressed, I am not going to accept that alternative. It is very clear to me that there must be a period of incarceration.”¹⁷⁹

It is difficult to generalise as to what the prevailing judicial rules, criteria and guidelines tells us about the locus of decision-making authority in cases where sentencing circles are convened, because there has been considerable variation in how these rules have been formulated by judges in different parts of the country. Certainly it is not possible to identify one set of uniform rules, although there is a considerable degree of common ground, centred on the two mandatory criteria endorsed by Bayda CJ in *R v Morin*.

Eligibility criteria of the type endorsed in Saskatchewan are suggestive of a tight judicial reign on the terms of community participation in the sentencing decision,¹⁸⁰ particularly when compared with the approach adopted by judges in the Yukon, where there has been minimal formulation of judicial rules and a strong emphasis on community rule-setting. However, on closer inspection, it appears that even relatively detailed criteria—such as those adopted in *Joseyounen*—do not necessarily significantly constrain the capacity of First Nation communities to

¹⁷⁸ *CP*, op cit, para 11. In *R v Dickson*, [1992] YJ No 211 (QL) (Yukon Territorial Court), the first case in the community of Burwash Landing to be handled by way of sentencing circle, Stuart J reminded the defendant of his obligation to repay the support shown to him by the community; If you fail, their punishment, their disappointment will be a lot tougher than anything I can impose today”: ibid, 2. See also *Naappaluk*, op cit, para 60, 69 per Dutil J.

¹⁷⁹ *CP*, op cit, para 42. In *Paul*, op cit, 2, Jackson J in the New Brunswick Provincial Court considered whether a circle would be appropriate in light of the fact that the offence (assaulting a police officer) was one “which usually called for a period of incarceration. Jackson J ruled this factor did not preclude the holding of a sentencing circle and ordered that one be held. (The offender’s application for a sentencing circle was not opposed by the Crown.)

¹⁸⁰ The appearance is even stronger in the case of the detailed rules formulated in *Manyfingers*. However, as noted above, the *Manyfingers* rules appear to have been designed for a rather different process than the model of circle sentencing which involves the judge as a participant which is the primary concern of this article.

participate in sentencing decision-making. Certainly the suggestion by Roberts and LaPrairie that “The number of cases that will meet ... [the] criteria will not be great and the impact upon admissions will consequently be derisory”,¹⁸¹ appears to overstate the likely impact of existing judicial rules and criteria. In *Joseyounen* Fafard J noted that the criteria “are not carved in stone”¹⁸² and subsequent decisions have emphasised the character of the criteria as guidelines rather than mandatory requirements. Attempts to impose a non-negotiable limit based on the seriousness of the offence (via the ‘two years imprisonment’ threshold) appear, in light of the Saskatchewan Court of Appeal decision in *Taylor*, to have failed. Finally, this article has not attempted to address the level of compliance with judicial criteria where they are ostensibly ‘in force’. Certainly this is one area in which reliable quantitative research would be valuable, in order to accurately determine the practical impact of rules, guidelines and criteria on the sentencing circle decision-making process.¹⁸³

¹⁸¹ Roberts and LaPrairie, op cit, 79. Despite their criticism of what they see as the restrictive nature of judicial criteria, Roberts and LaPrairie certainly do not advocate the relaxation of existing criteria. They argue that “if the criteria for inclusion in a circle are relaxed, and many cases are sentenced in this way, all hope of consistency of treatment and equity in sentencing can be abandoned”: ibid, 80. The presentation of these parallel arguments without any genuine attempt to find a compromise reflects a general tone of hostility towards sentencing circles that pervades this article by Roberts and LaPrairie. These commentators are, of course, entitled to be critical of sentencing circles, and may well argue that their obvious cynicism about, and opposition to, the practice represents an attempt to balance what they see as the exaggerated claims of proponents of circle sentencing. However, the overtly hostile tone of the critic does not sit well with the authors’ own statement of purpose – “The purpose of this article is not to *evaluate* sentencing circles ... but instead to raise a number of issues that need to be addressed”: ibid, 69. It appears that Roberts and LaPrairie were well aware of the harsh and potentially controversial nature of their critique. At the beginning of the article Roberts and LaPrairie offer the following qualification: “the primary focus of this article is the utility of sentencing circles to the non-aboriginal culture; their application to the area of aboriginal justice raises separate issues that cannot be fully explored in this article” (70). This is a curious and rather disingenuous ‘positioning’ given that that, to date, the practice of circle sentencing has been adopted almost exclusively in cases involving Aboriginal offenders, a fact which would have been well known to the authors. One wonders whether this ‘disclaimer’ was designed to take some of the political sting out of the author’s negative assessment of a sentencing practice which has been embraced by many First Nation communities as a desirable community-based alternative to conventional criminal justice processes.

¹⁸² *Joseyounen*, op cit, 183.

¹⁸³ In February 1998 the Saskatchewan Department of Justice reported the criteria developed and approved in *Cheekinew*, *Joseyounen* and *Morin* were “not used in the majority of cases”: Saskatchewan Justice, op cit, 9-10. However, it is worth noting that the limited data on circle sentencing cases contained in the report did not strictly support this conclusion. A review of 86 prosecution files of cases in which sentencing circles had been conducted revealed that the criteria had been used in 15% of cases. With respect to the remaining cases the report observed that “it was not known if criteria were used”: ibid, 9. While there appears to be insufficient data to substantiate the contention, Saskatchewan Justice is clearly concerned that the rate of compliance with the criteria is low, and that not all judges and communities have followed the criteria: author interview with David Gullickson, Senior Policy Analyst, Policy, Planning and Evaluation Branch, Saskatchewan Justice, Regina, 10 June 1998.

5.2 The Circle and the Sentencing Decision

The second key point of judicial discretion, an analysis of which is crucial to an assessment of the nature of the decision-making process in circle sentencing, is the judge's 'treatment' of the recommendations or outcomes of the circle process. How much freedom to determine sentence do communities enjoy via the practice of circle? To express this inquiry a little differently: What is the 'status' of circle deliberations? What role do sentencing circles play in sentencing decisions? Do circles merely produce recommendations which the sentencing judge may accept or reject in his/her complete discretion? Or have sentencing circles and the consensus of the circle effectively replaced the conventional sentencing hearing and the judge's opinion as the primary sites of decision-making?

The first thing to note is that, in contrast to the question of which cases should be considered eligible for circle sentencing, the question of the status of circle deliberations and recommendations has attracted much less in the way of explicit 'rule setting'. In large part this is because the question of where the power is located yields, at least formally, a simple answer: it is the judge and not the participants in the circle, who has the ultimate decision-making authority. Courts of Appeal have reinforced this principle in their appellate judgements.¹⁸⁴ Yet, as Larry Chartrand has argued, "If the judge is to give full respect to the aboriginal community, then his or her role must ... change from being the focus of attention and authority to one where he or she largely concedes the decision-making authority to the community."¹⁸⁵ Is this prescription for genuine and effective Aboriginal community participation in the sentencing decision reconcilable with the principle of judge as ultimate decision-maker? How have judges involved in circle sentencing attempted to reconcile these apparently conflicting imperatives?

Reflecting the foundation principle of the judicial function, it is customary in reports of cases involving sentencing circles for the judge to note that it is the judge who must ultimately make the decision on what sentence is passed on the offender. Having answered the threshold question in this way, it would be difficult and potentially risky (from the point of perceptions of the judge's integrity and of whether s/he is appropriately acting within the bounds of judicial authority) for judges to attempt to formulate 'rules' as to the decision-making aspects of sentencing circles; and so they have not done so.

In assessing the 'limits' of sentencing circles in this respect, therefore, it is necessary to consider the comments that judges have made in their judgements (as well as in views express extra-judicially) and to look beyond the formal legal position

¹⁸⁴ See, eg, *Johns*, op cit, 181 per McEachern CJ; and *Morin*, op cit, 48 per Sherstobitoff JA.

¹⁸⁵ Chartrand, op cit, 880.

to the position of law ‘in practice’, by examining the practical operation of circle sentencing.

Immediately upon beginning to review the case law it becomes clear that the formal legal position does not reveal the full picture. A number of judges involved in circle sentencing have stated that the deliberations and recommendations of the sentencing circle have, at a minimum, a substantial impact on the ultimate decision. In *R v SEH Stromberg-Stein J* noted that

At the outset [of the sentencing circle] it was made clear that though the ultimate imposition of sentence was my function, I would be aided and assisted by any recommendations made by the circle. I would go further and say I would be and I am persuaded by the recommendations made by the circle.¹⁸⁶

In *R v Naappaluk Dutil J* observed in relation to his own experience establishing (what he termed “consultation circles”):

As I see it, the judge’s role in a “consultation circle” is that of a discreet facilitator, who must allow participants to express themselves.

... Of course, the judge is not bound by the recommendations of the participants in the consultation. When I set up the consultation circles in Kangiqsujuaq, [an Inuit community in northern Québec, in May 1994] ... I clearly explained to all participants that I would not be bound by their recommendations. It is understandable, however, that if the judge systematically sets aside the circle’s recommendations, it may become entirely useless to hold such sessions. In my opinion, the judge must listen to the participants, discuss with them if need be, listen to their recommendations and follow them in most cases, unless he has serious reasons to set them aside, in which case he must explain clearly the reasons for his decision, so that the sessions are not looked upon as futile exercises.¹⁸⁷

In reporting on the first circle in which he was involved, Dutil J also noted that at the outset he “stressed the fact that, during the discussions, the members of the circle should consider the judge to be their equal.”¹⁸⁸

These judicial comments suggest that sentencing circle deliberations and recommendations represent a great deal more than mere advice to the sentencing judge. In this sense, it is erroneous to directly equate the status of a circle sentencing consensus with the recommendations contained in a conventional pre-sentence report

¹⁸⁶ *SEH*, op cit, para 2.

¹⁸⁷ *Naappaluk*, op cit, para 34-35; see *Aluka*, op cit.

¹⁸⁸ *Aluka*, op cit, para 45.

(a point which was recently confirmed by the Saskatchewan Court of Appeal in *R v Taylor*.¹⁸⁹)

Yet it is clear that there is a degree of judicial sensitivity to the perception that judges are effectively ‘handing over’ decision-making authority to the First Nation communities generally, and the sentencing circle participants in particular. For example, in *Naappaluk*, Dutil J concluded, somewhat inconsistently with his earlier comments (quoted above), that at the final sentencing hearing (in the case at hand)

The Court will ask the members of the [community justice] committee for their suggestion as to what sentence should be imposed. It will at no time feel bound by their recommendations. The Court, while maintaining all its decision-making powers, will nevertheless listen to the members of the committee with great interest.¹⁹⁰

What this apparent inconsistency reveals is the inherent paradox of attempting to reconcile First Nation communities’ aspirations for greater control over justice administration with the legalities, formalities and conventions of the mainstream criminal justice system. This paradox is particularly acute in the case of circle sentencing which is an attempt to achieve the former without directly altering the latter. It important that this basic tension not be ignored. Fafard J has explained:

... [I]n the end I’m the person who pronounces the sentence. At the moment, there is no legal structure for sentencing circles as such. And there’s no use fooling people. When I sit down with a sentencing circle, I say, “This is a process of empowerment. You’re empowered here to have some input.” But that’s not the same thing as saying “You’re being empowered to pronounce the sentence.” That would be lying to people and misleading them.¹⁹¹

Apart from this basic paradox, one of the problems which judges face is that, given the novelty of circle sentencing, just as there is no formal legislative foundation for the practice, there is no conventional judicial language to capture, in accurate and appropriate terms, the nature of decision-making in cases where sentencing circles are utilised. In *R v Rich (No 2)* O’Regan J attempted to convey the nature of decision-making in circle sentencing cases as follows: “By allowing community involvement in the sentencing process the court is not losing its jurisdiction, control or power over the accused. The fact is that the court, by using this process, merely *shares its control*.”¹⁹²

¹⁸⁹ *Taylor*, op cit, 407-408.

¹⁹⁰ *Naappaluk*, op cit, para 86.

¹⁹¹ Fafard J in *Nicholson*, op cit, 58.

¹⁹² *Rich (No 2)*, op cit, 182 (emphasis added).

This notion of ‘power sharing’ is apt to convey how the practice operates, reflecting as it does the collaborative nature of the exercise as between the judge, other court officers and the community. The notion of power sharing or partnership between the judge and the community has been emphasised by a number of judges involved in the development and implementation of sentencing circles.¹⁹³ In *R v Nicholas*, Desjardins J offered the following insight on the locus of control and authority in sentencing circles:

It is very important that the judge be willing not only to convene the circle but to allow the development of the circle to originate primarily from the community he or she must be prepared to relinquish his or her mantle of power and control with only one exception: the ultimate decision, and *he or she should be prepared to adopt the decision of the circle so long as it falls within the scope of a fit and proper sentence*. If I had retained control of who participated and the form of the process, the community participation would have been perfunctory. By deferring to the community, allowing it to determine the participants and details of process, I ensured that the process was driven by community choice and that the community was truly willing to participate.¹⁹⁴

This statement captures the *potential* of circle sentencing as a vehicle for shifting the locus of decision-making authority. However, it does not, of itself, reveal whether the power-sharing is substantive or merely procedural; symbolic or practically exercisable by communities. Of course, no generalised answer can be given to this question. Whether the potential for a shift in decision-making authority is realised depends on a number of variables, most obviously, the willingness of judges and members of First Nation communities to negotiate an appropriate system of power-sharing. The examples of judicial views discussed above reveal that at least in the case of many of the judicial proponents of the practice of circle sentencing, it is possible to detect an implicit endorsement of a convention of substantial deference to the consensus an/or recommendation that emerges from the circle. The existence of such an informal convention is also reflected in the (relatively limited) available quantitative and qualitative research data on the correlation between sentencing circle recommendations and sentences imposed by judges.

Based on a study of the operation of circle sentencing and other forms of community justice in Saskatchewan and Manitoba, Ross Green concluded that:

¹⁹³ See, eg, Stuart (1997), op cit, 4.

¹⁹⁴ *Nicholas*, op cit, para 19 (emphasis added).

... [C]ommunity members play a real part in the ultimate sentencing decision. Although the judge possesses the legal right and obligation to impose sentence, in reality, the sentencing decision is not always “made” by the judge. Of the sixty to seventy sentencing circles conducted by Judge Fafard in northern Saskatchewan by the winter of 1994, he claimed never to have rejected a circle consensus and believed that, as a result, community members were enjoying a significant role in decision making at court: “[The community] may not have the final say because I can’t give it to them, but I’m giving them a role in the decision-making process and they’re genuinely getting to believe that, if it’s within reason, I won’t interfere with it because I have never interfered with it. I’ve never had reason to disagree with a [sentencing] recommendation.”¹⁹⁵

Judge David Arnot, also of the Provincial Court of Saskatchewan, has similarly observed that while “the judge must be in agreement with the recommendation” of the sentencing circle before s/he can impose a sentence in accordance with the recommendation, it is “rare” for the judge not to accept the recommendation of the community.¹⁹⁶ Data contained in Saskatchewan Justice’s 1998 Aboriginal Justice Strategy Interim Report,¹⁹⁷ though inconclusive, also suggests a high correlation between the recommendations of the sentencing circle and the sentence imposed by the judge.¹⁹⁸

In a 1996 review of community justice initiatives by the Teslin Tlingit First Nation in the Yukon, Griffiths reported that “To date, 98% of all sentences handled by community members in Teslin have fallen within the limits set by the [Territorial Court of the Yukon].”¹⁹⁹ Further, in a study of four models of community justice,²⁰⁰ Bazemore and Griffiths concluded that

¹⁹⁵ Green, op cit, 74. See also Ross Green, “Aboriginal Community Sentencing and Mediation: Within and Without the Circle” (1997) 25 *Manitoba Law Journal* 77 at 86-90.

¹⁹⁶ Judge David Arnot, “Sentencing circles permit community healing”, *National* (October 1994) p 14.

¹⁹⁷ Saskatchewan Justice, op cit.

¹⁹⁸ In 52% of the 86 case files reviewed, it was “unknown” if the judge followed the circle’s recommendation. The recommendation of the sentencing circle was followed in 36% of cases, “followed somewhat” in 11% of cases. The judge did not follow the sentencing circle’s recommendation in only 1% of cases: *ibid*, 10.

¹⁹⁹ C Griffiths, op cit, 201. It is not clear whether the cases reviewed by Griffiths involved circle sentencing specifically, or whether they included cases handled using other forms of community sentencing, such as the practice of Teslin Tlingit clan leaders sitting with the judge to advise on sentence, or the Teslin Tlingit Peacemaker Court (discussed above). Nonetheless, the findings are significant in the present context. Also significant, in light of the suggestion made by some critics of circle sentencing that the practice is concerned with achieving ‘lighter’ sentences for Aboriginal offenders, is Griffiths’ explanation that: “Those sentences which have gone beyond the limits set by the Territorial Court judge have been harsher than the sentence recommended by the prosecutor and/or the judge”: *ibid*.

²⁰⁰ The four models reviewed are victim-offender mediation, family group conferencing, circle sentencing, and a reparative probation program.

Circle Sentencing appears most advanced in an implicit continuum of the importance given to the decisionmaking role of communities. ... Acting through the Community Justice Committee, the community is clearly the “driver” in determining which offenders will be admitted to the circle.²⁰¹

While a definitive conclusion must await more comprehensive data collection and evaluative research, the evidence available to date suggests that circle sentencing does have the potential to significantly shift the locus of decision-making away from the judge and the conventional justice administration system, and towards First Nations communities; and that the process is, in many cases, being employed in a manner which renders this shift in practical rather than merely symbolic terms.

The attitudes of appellate courts on the question of the status of sentencing circle recommendations must also be taken into account. As discussed earlier, appellate court judges have, on the whole, strongly endorsed the conventional view that ultimate decision-making authority remains with the judge. At the same, a Court of Appeal has only once upheld a Crown appeal against a sentence imposed in accordance with the recommendation of a sentencing circle.²⁰² In addition, there is some support—most notably in the judgements of Bayda CJ of the Saskatchewan Court of Appeal—for recognition of a more substantial decision-making function legitimately exercisable by sentencing circle participants.

In his dissenting judgement in *Morin* Bayda CJ attempted to lay out a set of guidelines to assist sentencing judges in determining the weight to be given to the circle’s deliberations and recommendations, or as the Chief Justice more accurately put it, the “legal effect of a sentencing circle’s conclusion”.²⁰³ These guidelines take the form of two questions which, in the view of the Chief Justice, the judge should ask herself/himself at the end of the sentencing circle.

The first is this: After hearing what took place in the sentencing circle and keeping in mind the two prerequisites, as well as the other factors I considered in deciding whether a sentencing circle should be held, am I still satisfied that the restorative approach is the right approach in this case? ... [If the answer is no] ... the judge will revert to the ordinary approach and impose a fit sentence according to the usual norms that apply when that approach is used. In that case the sentence circle proceedings would serve the same purpose

²⁰¹ Bazemore & Griffiths, op cit.

²⁰² *R v Morin*, op cit. The Yukon Territorial Court of Appeal also upheld a Crown appeal against sentence in a case where the sentence had been imposed by a sentencing circle: *R v Johnson*, op cit. However, in this case the appeal did not turn on the substance of the circle’s recommendations, but on the sentencing judge’s legal interpretation of relevant legislation. See further, McNamara, op cit.

²⁰³ Ibid.

as a sentencing hearing would serve where an ordinary approach is used. On the other hand, where the judge answers the first question, “yes ...”, he or she should ask the second question: Would the recommendations by the sentencing circle, if accepted, constitute a fit sentence ... in the restorative sense? ... If the answer to the question is “yes” then with one exception that end the matter but for the imposition of sentence. ... If the answer is an unequivocal “no”, the judge ought not to impose a restorative sentence which involves the community in a way it did not expect or want to be involved. The imposition of such a sentence upon an unwilling offender and involving an unwilling community would likely seriously undermine the chances of success of the restorative component. The central purpose of the restorative approach would be lost. The judge’s best recourse in that situation would be to revert to the ordinary process and impose a sentence accordingly.²⁰⁴

Given the uncertainty and controversy surrounding the relationship between the recommendation of the sentencing circle and the sentence ultimately handed down by the judge, Bayda CJ’s attempt to outline a way of navigating the ‘fine line’ between meaningful community participation in, and the judge’s formal authority over, the sentencing decision is noteworthy. However, the practical utility of the guidelines provided by Bayda CJ may be weakened by their complexity and lack of precision. A great deal is still left to the judge’s discretion, particularly the threshold question regarding the appropriateness of a ‘restorative approach’ in any given case. Of more direct relevance to the question of the locus of decision-making authority in cases where a sentencing circle is convened is the ambiguity of Bayda CJ’s approach where the judge answers the second question in the negative. On the one hand, the recommendation that in such a situation the judge should abandon the restorative approach and impose a sentence according to ordinary principles appears to reinforce the conventional notion that, in practice, only those outcomes recommended by the circle that fall within the parameters of a ‘fit’ sentence set by the judge will be endorsed by the judge. On the other hand, it is implicit in Bayda CJ’s recommended approach to such situations that the sentencing circle should have primary ownership of any sentence which is based on restorative principles, so that if the judge is of the view that the sentence recommended by the circle is not a fit sentence, s/he must not simply reject the recommendation but must also reject the restorative approach altogether. This ‘all or nothing’ approach is somewhat curious, but it does have the

²⁰⁴ Ibid, 75-76. The exception identified by Bayda CJ was that “where the sentencing circle recommends an incarceral component exceeding two years. In that situation s 737(1)(b) of the Code would come into play and the judge, by virtue of being unable to make a probation order, would be unable to give effect to the remaining recommendations of the sentencing circle. The judge would then be compelled to treat the sentencing circle’s recommendations as if his answer to the question were an unequivocal ‘no’”: *ibid*, 76.

virtue of allowing for a fairly clear distinction between cases in which a restorative justice approach has been adopted and cases where it has not.

Further support for the view that the deliberations and recommendations of the circle can legitimately be seen (and, indeed, should be seen) as central to the sentencing decision-making process, rather than mere advice to the sentencing judge, can be found in Bayda CJ's majority judgement in *R v Taylor*.²⁰⁵ In this case the Court of Appeal held that the sentencing judge made numerous errors in the establishment and conduct of the sentencing circle. Despite these errors the Crown appeal against sentence was dismissed because the judge had ultimately deferred to the view of the sentencing circle, the participants in which, by their proper consideration of the issues had effectively 'remedied' the process which had been flawed by the judge's errors. Bayda CJ stated that

In the end, the validity of the process was saved by the attitude, conduct, and thinking of the *circle participants who were the principal authors and creators of the sentence which the trial judge approved and adopted as his own*. Accordingly, the recommendations of the sentencing circle have a distinct and important role to play in any assessment of the fitness of the sentence.²⁰⁶

In *Taylor*, Bayda CJ approved of the circle playing the *primary* decision-making role. Even if this characterisation of the respective decision-making roles of the judge and the other circle participants is considered as exceptional, reflecting the particular and arguable atypical procedural facts of the case, the decision in *Taylor* stands as an important judicial endorsement of the view that sentencing circle participants can legitimately play a key role in the decision on sentence. This suggests that circle sentencing does provide for a significant shift in the locus of decision-making authority from the judge to the community. This conclusion is also supported by the (admittedly limited) evidence which is currently available on the weight and status afforded to sentencing circle recommendations by sentencing judges.

6. A STATUTORY FOUNDATION FOR CIRCLE SENTENCING?

One of the most distinctive features of the development of circle sentencing is that it has occurred at the community level — commonly as a 'joint venture' between circuit court judges and First Nation communities — and not as part of a government-

²⁰⁵ Jackson JA concurred in both of these judgements.

²⁰⁶ *Ibid*, 409 (emphasis added).

sponsored law reform initiative. As Judge Barry Stuart has noted, with specific reference to the development of circle sentencing in the Yukon:

From the outset, until now, the Yukon Community Circle process, in shifting the sentencing process from courts to communities, from a right-based adversarial process to an interest-based consensus process, and from an exclusive professional ownership to a shared community-based partnership has been carried out without changes to legislation, to administrative or financial arrangements, and without co-ordinated support from justice agencies. It has evolved on its own momentum.²⁰⁷

These origins are both a strength and a weakness of circle sentencing. On the one hand, the emergence of circle sentencing at a distance from executive government and without a formal legislative framework has allowed the practice to emerge and take shape largely free of the potentially stifling influence of government policy considerations and in a manner adapted to the particular needs of the community, rather than in conformity with a grand legislative scheme. On the other hand circle sentencing is vulnerable to the extent that, having no formally recognised authority in its own right, it relies for its survival on judicial goodwill (including the capacity of the judge to build a relationship of trust with the community),²⁰⁸ community motivation and resources, and the support of justice system professionals. As Larry Chartrand has observed, until such time as there is a clear legislative basis for Aboriginal community decision-making in relation to sentencing, or more broadly in relation to justice administration,²⁰⁹ then “the extent to which the circle sentencing process will be a vehicle for true community input in the decision-making process is up to the judge.”²¹⁰

It may be suggested that s 718.2(e) of the Criminal Code, introduced in 1996 as part of a codification of sentencing principles,²¹¹ provides such a statutory foundation. Section 718.2(e) provides that one of the principles which a judge must take into account when sentencing an offender is “all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, *with particular attention to the circumstances of aboriginal offenders*”.²¹²

²⁰⁷ Stuart (1997), op cit, 113.

²⁰⁸ See Barnett, op cit, 3-4. Judge Linton Smith has emphasised the importance of this trust relationship in light of his experience with sentencing circles on circuit in southern Saskatchewan communities: author interview with Judge Linton Smith, Provincial Court of Saskatchewan, Regina, 10 June 1998.

²⁰⁹ Chartrand has argued that “Legislation by aboriginal governments, under the inherent right to control social order within their communities, or by the Federal government, is the desired response”: Chartrand, op cit, 880, n 12.

²¹⁰ Ibid, 880.

²¹¹ See Criminal Code, RSC, 1985, c C-46, Part XXIII (came into force on 3 September 1996).

²¹² Emphasis added. Other principles expressed in the legislation include proportionality (s 718.1), due regard to aggravating or mitigating factors (s 718.2(a)), parity (s 718.2(b)), avoidance of undue length

In *R v Wells*²¹³ the Alberta Court of Appeal held that in accordance with s 718.2(e) sentencing judges are required to take into account unique considerations relevant to Aboriginal offenders not just with respect to sentencing *outcomes* or alternative dispositions, but also with respect to sentencing *decision-making processes*.²¹⁴ The Court ruled that judges must consider

... not only social factors particular to aboriginal Canadians but as well the fact that within the aboriginal community alternative approaches to sanctions, including such things as sentencing circles and input from tribal elders, are being developed.²¹⁵

In *R v Gladue*²¹⁶ the Supreme Court of Canada confirmed that the unique circumstances of Aboriginal people that sentencing judges were required to take into account in fulfillment of the “remedial role”²¹⁷ imposed on them by Part XXIII of the Criminal Code, and s 718.2(e) in particular,²¹⁸ included both the processes and outcomes of sentencing:

The background considerations regarding the distinct situation of aboriginal people in Canada encompass a wide range of unique circumstances, including most particularly:

- (A) The unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts; and

or harshness where consecutive sentences imposed (s 718.2(c), and incarceration as a last resort (s 718.2(d)).

²¹³ *R v Wells*, [1998] AJ No 405 (QL) (Alberta Court of Appeal).

²¹⁴ See also *CJ*, op cit, 457 where the Newfoundland Court of Appeal considered and implicitly accepted the appellant’s submission that s 718.2(e) requires an approach to sentencing Aboriginal offenders which “... should, in principle, affect both the procedure to be adopted for resolution of identified criminal conflict as well as the substantive principles to be applied as to how that resolution can be best achieved. At the procedural level, it involves, different, more inclusive, ideas of conducting the sentencing hearing, employing such devices as a sentencing circle designed to facilitate a more communitarian and holistic approach to dealing with the interests involved.”

²¹⁵ Ibid, para 47 per Sulatycky JA, Cairns and Belzil JJ.

²¹⁶ [1999] 1 SCR 688.

²¹⁷ Ibid, para 66.

²¹⁸ After discussing the overwhelming evidence of Aboriginal over-representation in the criminal justice system (paras 58-63), including the findings of the Royal Commission on Aboriginal Peoples (RCAP, op cit) and the Aboriginal Justice Inquiry of Manitoba (AJIM, op cit) the Court observed that: “These findings cry out for recognition of the magnitude and gravity of the problem, and for responses to alleviate it. The figures are stark and reflect what may fairly be termed a crisis in the Canadian criminal justice system. The drastic overrepresentation of aboriginal peoples within both the Canadian prison population and the criminal justice system reveals a sad and pressing social problem. It is reasonable to assume that Parliament, in singling out aboriginal offenders for distinct sentencing treatment in s 718.2(e), intended to attempt to redress this social problem to some degree. The provision may properly be seen as Parliament’s direction to members of the judiciary to inquire into the causes of the problem and to endeavour to remedy it, to the extent that a remedy is possible through the sentencing process” (para 64).

- (B) The *types of sentencing procedures and sanctions* which may be appropriate in the circumstances for the offender because of his or her particular aboriginal heritage or connection.²¹⁹

With respect to the adoption of appropriate sentencing procedures and sanctions the Court held that s 718.2(e) required sentencing judges to respond to the fact that Aboriginal people hold “different conceptions of appropriate sentencing procedures and sanctions” and that “the traditional sentencing ideals of deterrence, separation, and denunciation are often far removed from the understanding of sentencing held by ... [Aboriginal] offenders and their community.”²²⁰ Specifically, s 718.2(e), along with other provisions of Part XXIII of the Criminal Code,²²¹ requires judges to consider the appropriate application of restorative justice principles,²²² particularly for Aboriginal offenders given that “most traditional aboriginal conceptions of sentencing place primary emphasis upon the ideals of restorative justice.”²²³

In a number of respects *Gladue* is a useful and welcome judicial articulation of the significance of s 718.2(e) for the treatment of Aboriginal people in the Canadian criminal justice system. Of particular significance is the Supreme Court of Canada’s endorsement of restorative justice sentencing principles, its designation of s 718.2(e) as an attempt to remedy the injustice and over-representation over Aboriginal people in the criminal justice system, and its clear statement that sentencing judges have a *duty*²²⁴ to consider the unique circumstances of *all* Aboriginal offenders.²²⁵

However, there is little in the Supreme Court of Canada’s judgment to support the characterisation of s 718.2(e) as a firm legislative foundation for community-based *decision-making* processes like circle sentencing. In articulating the practical

²¹⁹ Ibid, para 66 (emphasis added).

²²⁰ Ibid, para 70.

²²¹ Sections 718(e) and 718(f). See *Gladue*, op cit, para 43.

²²² On the meaning of restorative justice, the Court observed that “The concept and principles of a restorative approach will necessarily have to be developed over time in the jurisprudence, as different issues and different conceptions of sentencing are addressed in their appropriate context. In general terms, restorative justice may be described as an approach to remedying crime in which it is understood that all things are interrelated and that crime disrupts the harmony which existed prior to its occurrence, or at least which it is felt should exist. The appropriateness of a particular sanction is largely determined by the needs of the victims, and the community, as well as the offender” (*Gladue*, op cit, para 71).

²²³ Ibid, para 70.

²²⁴ The Court stated that “There is no discretion as to whether to consider the unique situation of the aboriginal offender; the only discretion concerns the determination of a just and appropriate sentence”: *ibid*, para 82.

²²⁵ At first instance in *Gladue*, the sentencing judge in the Supreme Court of British Columbia had ruled that s 718.2(e) had no application to the offender because she lived off-reserve in an urban area. The Supreme Court of Canada confirmed that the British Columbia Court of Appeal had been correct in rejecting this narrow interpretation of the scope of s 718.2(e), and ruled that “The class of aboriginal people who come within the purview of the specific reference to the circumstances of aboriginal offenders in s 718.2(e) must be, at least, all who come within the scope of s 25 of the Charter and s 35 of the Constitution Act, 1982”: *ibid*, para 90.

implications of the requirement imposed on judges by s 718.2(e) to consider appropriate sentencing procedures and sanctions, the Court focused on “the importance of community-based *sanctions*”.²²⁶ The only active role in the *determination* of sanctions for Aboriginal community members to which explicit reference was made by the Court was as potential providers of information who might be called on to make the judge “aware of alternatives to incarceration that exist whether inside or outside the aboriginal community of the particular offender.”²²⁷ The Court stated that “Beyond the use of the pre-sentence report, the sentencing judge may and should in appropriate circumstances and where practicable request that witnesses be called who may testify as to reasonable alternatives.”²²⁸ This information “may come from representations of the relevant aboriginal community which will usually be that of the offender.”²²⁹

It would be unwise to read too much into this aspect of the Supreme Court of Canada’s decision in *Gladue*. The case was not one in which the sentence had been determined via a sentencing circle or any other form of community-based procedure. Consequently, the issue of the relationship between circle sentencing and s 718.2(e) of the Criminal Code was not squarely before the Court. Certainly, there is nothing in the judgment that raises any doubts about the legitimacy of the practice of sentencing circle. The only mention of the practice by the Court took the form of an aside that it was “unnecessary to engage here in an extensive discussion of the relatively recent evolution of innovative sentencing practices, such as healing and sentencing circles, and aboriginal community councils”.²³⁰ However, the Supreme Court of Canada’s narrow characterisation of the role of Aboriginal communities in the fulfillment of the objectives of Part XXIII and s 718.2(e) of the Criminal Code, suggests that it is unlikely that s 718.2(e) will be interpreted as providing a solid legislative foundation for circle sentencing, including active participation by community members as decision-makers rather than simply as sources of information or providers of alternative sentencing dispositions.²³¹ To the extent that s 718.2(e) is an example of the Parliament ‘catching up’ with the initiation of circle sentencing and other forms of community-based justice administration, the legislation ventures only a short distance down the path already established by judges and First Nation communities.

²²⁶ Ibid, para 74 (emphasis added).

²²⁷ Ibid, para 84.

²²⁸ Ibid.

²²⁹ Ibid, para 93.

²³⁰ Ibid, para 74.

²³¹ My thanks to one of the anonymous referees for encouraging me to consider this issue.

7. CONCLUSION

Drawing on the analytical perspective of legal pluralism, this article has examined the significance of circle sentencing as a step towards increased First Nation community decision-making authority in relation to the administration of justice. On the face of it, and in light of the established rules, criteria and guidelines, the locus of authority appears to have shifted little. However, on closer inspection, this article has revealed that the use of sentencing circle has the potential to be (and in a number of communities has proved to be) considerably more than a token gesture in the direction of recognising Aboriginal law and justice values and mechanisms for dealing with wrongdoing. If the practice of circle sentencing has its foundation in the community, and provided there is a genuine willingness on the part of the judge (and other key players, including the Crown and defence counsel²³²) to share power and control with respect to the sentencing of Aboriginal offenders, then circle sentencing can constitute an important shift in the locus of decision-making authority.

The fundamental principle that the judge must make the ultimate decision on sentence has not proved to be as significant a brake on community decision-making authority as might be assumed. There is considerable variation across the country in terms of judicial perceptions of the status of circle deliberations and recommendations, but a convention of respect for, and deference to, the views of the sentencing circle has been adopted by a number of judges. Circle sentencing appears most likely to ‘work’ where it is based on a recognition that sentencing by the offender’s community is both a more appropriate and, potentially, more effective method of decision-making than conventional judicial sentencing. In this way circle sentencing is founded on a recognition and appreciation of the existence of two (or more) normative orders operating simultaneously, centred on the conventional criminal justice system and the First Nation community respectively. Therefore, notwithstanding the *formal* constraints under which circle sentencing operates, the

²³² While this article has focused primarily on the necessary modification of the judge’s role as a necessary condition for the effective operation of circle sentencing as a mechanism of community decision-making, Larry Chartrand has made the valuable observation that circle sentencing also requires a fundamental change in the role of counsel. Most importantly, defence counsel’s responsibility to protect the client’s best interests and role as client advocate may conflict with his/her responsibilities as a participant in the sentencing circle. Chartrand notes that “the lawyer’s protection of the client’s interests threatens the very purpose of having the circle sentencing process in the first place. The more the lawyer acts as an advocate in directing his remarks to the judge, knowing that the decision of sentencing remains within the judge’s discretion, the more the process is transformed. Essentially, the role of the community becomes depreciated and weakened, to the point where its members become mere observers, in a traditional adversarial setting ... In other words, for the circle sentencing process to function as intended (ie as a process for the community to actively participate in reaching an appropriate sentence based on community consensus), and not as a more elaborate version of a pre-sentence report, the lawyer must relinquish the role of advocate”: *ibid*, 878-879.

practice of circle sentencing can be seen as a manifestation of legal pluralism in both the social/empirical and legal/juridical senses outlined above.

In making this observation it is important not to overstate the pluralist credentials of circle sentencing. To speak of circle sentencing as involving an acknowledgement of legal pluralism as both an empirical reality and a desirable justice reform aspiration is not to prematurely offer the Canadian justice system ‘absolution’ or a post-colonial ‘clean bill of health’. The practice of circle sentencing cannot, of itself, be considered to remedy the myriad deficiencies of the mainstream criminal justice system which impact adversely on Aboriginal communities,²³³ let alone satisfy the aspirations of Aboriginal people for self-government in the area of justice administration. However, given its capacity to shift important dimensions of justice administration decision-making authority from the mainstream courts to First Nation communities, circle sentencing points to the viability and desirability of the adoption of pluralism and autonomy as foundational principles for Aboriginal justice reform.

²³³ See also *Gladue*, op cit, para 65, where Cory and Iacobucci JJ (for the Court) observed that “It is clear that sentencing innovation by itself cannot remove the causes of aboriginal offending and the greater problem of aboriginal alienation from the criminal justice system”.